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No. 07-988

IN THE

Supreme Court of the United States

RAFAEL DIAZ-RAMOS, PETITIONER

v.

HYUNDAI MOTOR COMPANY AND HYUNDAI AMERICAN TECHNICAL CENTER, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A Puerto Rico statute entitles the consumer to file a private *individual* suit in the Department of Consumer Affairs against any unfair trade practice. However, because the powers of this governmental agency are limited, the Consumer Class Action Act (CCAA) grants to the consumer the "right" to file *directly* in "Court" a "class" action "based" on the antitrust section 259, which forbids all unfair trade practices. The CCAA creates "additional" remedies by imposing "equal" class-wide damages plus mandatory prejudgment interests, costs and "not less than 25%" for counsel fees (aside from availing an injunctive relief). A legal "Trust Fund" is used to distribute the class recovery, the unclaimed share of which benefits all consumers. Yet, the appellate court relied upon Fed.R.Civ.P. 23 decisions while holding that the CCAA is merely "procedural" and that it cannot thus create a "right" to recover or sustain a "cause of action." And so, the court decided that because Petitioner cannot pursue his unfair-practice claim *individually* in "Court," he thus cannot recover as part of a "class."

The questions presented are:

1) Whether it is "substantive" — for purposes of *Erie*, *Hanna* and progeny — a state rule that requires several persons to unite as a class in order to enforce their *common* interest in the collection of a state-created *single* liability.

2) Whether the federal-court nullification of Puerto Rico's Consumer Class Action for Unfair Trade Practices compels a reversal in light of established precedents.

In the alternative, whether the Puerto Rico

Supreme Court's intervening and conflicting precedent in *Guzmán v. Vaquería*, 2006 TSPR 187, compels a GVR order for further consideration pursuant to 28 U.S.C. § 2106.

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JURISDICTION

The Court of appeals' judgment was entered on August 30, 2007. A timely petition for rehearing was denied on September 24, 2007. Due to a timely filed application, this Court extended the time to file the petition for writ of certiorari to and including January 22, 2008.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

The relevant provisions of Puerto Rico Laws Annotated are reproduced at App. 29a-32a.

STATEMENT

This case raises important, recurrent questions relating to the elusive distinction between "substantive" and "procedural," as well as to the proper scope of Rule 23 of Federal Rules of Civil Procedure in diversity actions.

A. Puerto Rico's Consumer Class Action for Unfair Trade Practices.

The petitioner Rafael Diaz brought this diversity action on behalf of himself and a proposed class of about

35,000 consumers in Puerto Rico, for all of them own a model-year 1995, 1996 or 1997 Hyundai Accent car that was *unlawfully excluded* from two (2) manufacturer-initiated "recalls." (J.A. 1-10). [1]

As damages and injunctive relief, Diaz claimed an amount equal to the class-wide costs of publishing and securing in Puerto Rico the reasonably necessary *safety precautions* that respondent Hyundai Motor Company of Korea must take affirmatively in order to retrofit these cars, and thus prevent or repair their corrosion-related "suspension" problems. (J.A. 12-15, 22-26). The alleged damages were estimated to be between "$500.00" and "$1,000.00 per vehicle repair." (J.A. 70).

Both recalls merely met the "policy" guidelines of the National Highway Traffic Safety Administration (NHTSA) that state that any automaker initiating a corrosion-related "regional recall" should include at a "minimum" the 20 salt-belt states, and the District of Columbia, where salt is used to deice the roads during winter. However, because NHTSA has never codified this "policy" in "binding regulations," the District of Columbia Appellate Court held that such "policy" has neither "legal force" nor "binding effect," nor can it establish "new rights and obligations" and thus does "not change an automaker's legal obligations." *Center for Auto Safety, Inc. v. NHTSA*, 452 F.3d 798, 808-811 (2006). In other words, this "non-binding policy" cannot provide a "norm or safe harbor" for automakers to

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[1]The abbreviated references are used for: Appendix of this petition (App.); petitioner's Main Brief in court of appeals (M.B.) and Main Brief Appendix (M.B.App.); Certified Translations in court of appeals (C.T.); petitioner's Reply Brief in court of appeals (R.B.) and Reply Brief Appendix (R.B.App.); and the Joint Appendix in court of appeals containing the complaint (J.A.).

shape their actions. *Id.* (R.B. 21-35).

And so, Diaz contended that the respondent automaker must abide by the law in Puerto Rico — where the marine-salt environment may also trigger the two (2) *hidden* corrosion-induced safety hazards, that Hyundai sought to monitor and prevent or repair by voluntarily conducting its two "regional recalls." (J.A. 10) (M.B. 4-15).

Diaz grounded his claim for relief on the Consumer Class Action Act (CCAA) of Puerto Rico, sections 3341 and 3342 of Title 32, which grants to the consumer the "right" to file a "class" suit in "Court" for "damages" as well as "injunction," and "based on the Antitrust Act of the Commonwealth, §§ 257-274 of Title 10." (App. 29a). Accordingly, Diaz premised his cause of action on the section 259 of Title 10 that forbids all "unfair or deceptive acts or practices in trade or commerce." (App. 30a) (J.A. 22).

Additionally, Diaz invoked the CCAA remedy provision 3343, the letter of which states that the court not only can "prevent, avoid, deter and punish any action to the prejudice of the consumers," but also "shall impose:"

> [1] an amount *equal* to the damages determined as compensation for damages,
>
> [2] plus a reasonable amount not less than 25% for attorney's fees,
>
> [3] plus legal interest from the moment the damages is caused
>
> [4] and costs of the proceedings.

(App. 29a-30a) (J.A. 24) (emphasis added). For the distribution of this class recovery, the Puerto Rico law commands to set up a "Trust Fund to be used according

to an order issued by the sentencing court." Title 23, § 1017 (App. 32a). After one year, any unclaimed amount must be deposited in another "Trust Fund" to be used by either the Department of Consumer Affairs or the Department of Justice "in initiating future actions for the protection of the consumers." *Id.*, and 1016(b) (App. 31a) (J.A. 24-26).

B. The "Special Cause of Action" created by the Consumer Class Action Act of Puerto Rico.

The legislative history explains that the CCAA affords a "*special cause of action* based upon the urgent interest of the Commonwealth of Puerto Rico in protecting consumers." CCAA's Statement of Motives for Amendment of 2002. (M.B.App. 16-17) (emphasis added). That is because the CCAA was enacted to protect consumers against the "*deceitful*, *improper*, *false* or *fraudulent* practices" in trade or commerce. (App. 4a-5a) (emphasis added).

Recently, in *Guzmán v. Vaquería*, the Supreme Court of Puerto Rico construed that the CCAA was intended to solve the "limitation of the legal tools available" to consumers. 2006 TSPR 187 (App. 23a). The premise of this conclusion is found in the "legislator's concern" stressing that:

> Unfortunately the remedies available to consumers to enforce their rights are still inadequate and the protection offered the consumer by the Consumer Service Administration [now Department of Consumer Affairs] . . . is not sufficient . . . For this reason, a suit filed directly by the consumer is warranted

in such cases.

Guzmán, id., quoting the CCAA's Statement of Motives of 1971 (App. 23a). Thus, because the "remedies" and "protection" provided by such governmental agency are "inadequate" and "not sufficient," the drafters created the Consumer Class Action Act (CCAA).

On one hand, the CCAA section 3341 entitles the "Commonwealth of Puerto Rico, through their agencies, dependencies and instrumentalities in their capacity of parens patriae" to file a "class" suit on behalf of consumers. (App. 29a). Accordingly, the Puerto Rico Supreme Court held that this provision specifically entitles the Secretary of the Department of Consumer Affairs (formerly called Director of the Consumers Service Administration) to file a "class" action on behalf of either the consumers in "general," or certain "groups" of consumers, or on behalf of any consumer in "particular." *Hernández Denton in his capacity as Director of ASERCO, in representation and in behalf of Eugenio Cámara Rodríguez, Wallace A. Seda, Victor M. D'Cristina et al., v. Western Pines Corp.*, 1975 WL 38794, 3 P.R. Offic. Trans. 1028. In other words, the CCAA allows the Secretary of this governmental agency to file a "class" suit not just to protect the public interest, but to further protect the *private* interest of any consumer in "particular." *Id.*

On the other hand, the CCAA likewise vests upon any injured consumer the same representative "capacity." *Id.* That is because the CCAA "authorize[s] the consumers to go *directly* to Court to vindicate their rights *without* having to be *assisted by a governmental agency*." *Guzmán, supra* (App. 24a) (emphasis added). Put differently, the CCAA allows the consumer to

"avoid the obstacles that are occasionally presented by the bureaucracy of the *agencies* that are called upon to defend them." *Id.* (App. 25a-26a) (emphasis added). Briefly, the CCAA's "objective is to eliminate all legal obstacles that might make it difficult for the consumers to go to Court." *Id.* (App. 24a). Thus, the CCAA constitutes the "Legislature's mandate to pave the way to court for consumers." *Guzmán* (App. 26a).[2]

In addition, the Supreme Court of Puerto Rico construed that by drafting the CCAA the legislator "recognized the inherent difficulty of claiming small sums against the big businesses." *Id.* (App. 23a). As basis, the *Guzmán* Court quoted this entire passage of the CCAA's "Statement of Motives:"

> Usually claims of the consumers involve such small amounts of money that they do not justify an *individual* suit; it is more economical and fair that claims essentially identical be filed in a single class suit on behalf of all consumers who have been *cheated* and *deceived*... This type of action compensates the inability of the individual consumer to litigate small individual losses by permitting that *one* or more representatives of a group of consumers with similar damages may bring a suit on behalf of a class...The latter are forced to consider not only the direct economic loss of the class suit but also the publicity and public reaction with the entailing loss of time, name or prestige. In the interest of discouraging

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[2]The *Guzmán* construction of the CCAA serves to define also the *individual* injunction that the antitrust section 269 authorizes the Secretary of Justice to file in "Court" against any unfair trade practice.

> the *improper* and *deceitful conduct* of the suppliers of goods and services to consumers, the Legislature of Puerto Rico considers it of imperative necessity to establish the consumer class suit.

Guzmán, id. (App. 23a-24a) (emphasis added). That is why the CCAA "recognizes the right to the consumers to file an action under the Antitrust Act of the Commonwealth of Puerto Rico, 10 LPRA § 257 et. seq.," *id.* (App. 25a) — which includes the antitrust section 259(a). The CCAA "constitutes, therefore, a mandate for the courts to open our doors to the consumers injured by the *unlawful* practices of the providers of goods and services." *Guzmán, id.* (App. 26a).

And so, the Puerto Rico Supreme Court's construction of the CCAA illustrates why the legislator deemed as "inadequate" and "not sufficient" the private *individual* actions that section 1005(g) of Title 23 entitle the consumers to file in the Department of Consumer Affairs against "*any* unfair or deceitful act or practice" (App.31a) -- that is, against the "unfair or deceptive acts or practices" that section 259(a) expressly declared "*unlawful.*" (App.30a) (emphasis added). For even though the Department of Consumer Affairs (formerly known as the Consumer Service Administration) must watch over the consumers' private interests and "basic rights" — including their "protection from dangerous products and against unscrupulous practices" — when it was originally created in 1968 this governmental agency was authorized to merely issue "corrective orders" to repair defects or reimburse the costs of repair. *Hernandez Denton v. Quiñones Desdier*, 1974 WL 36883, 2 P.R.

Offic. Trans. 274.[3]

Thus in order to solve such "limitation of the legal tools available" at the Department of Consumer Affairs, the drafters created the CCAA in 1971 to not only "extend[] the remedies available for the consumers" (App.26a), but to also "allow[] the concession of *additional* remedies" (App.25a) — like the mandatory "equal" class-wide damages, prejudgment interests, costs, statutory counsel fees, and the class-wide injunctive relief availed by the CCAA section 3343. (App.29a-30a) *Guzmán*, *supra* (emphasis added). And all these *new* remedies provided by the CCAA were "established therein" only. *Guzmán*, *id.* (App. 27a).

In summary, the CCAA constitutes a "specific tool that grants the consumers a broad and effective instrument to protect their *rights*" against the "*improper* and *deceitful conduct* of the suppliers of goods and services." *Id.* (App. 25a, 24a) (emphasis added). For the CCAA allows the consumer to file a suit *directly* in "Court" without having to go first to the Department of Consumer Affairs.[4]

Indeed, even though "the courts are the only

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[3]The *Quiñones* Court explained that when section 1005(g) was added in 1972 it did "not create" the "powers" of the Consumer Service Administration to "adjudge the complaints" it receives against unfair trade practices. Instead, the addition of section 1005(g) only "eliminated" any "possible doubts or controversies" as to the "powers" of the Administration "regarding those matters" — that is, its purpose was to "reaffirm" such powers. *Id.* Thus, although the CCAA was enacted in 1971, the *Guzmán* construction serves to define the private *individual* action that section 1005(g) alludes to.

[4]Any person adversely affected by a decision of the Department of Consumer Affairs can also file an appeal for review to the Court. P.R. Laws Ann. Title 23 § 1009(b), and Title 3 § 341p.

ones that can certify class suits," many of the consumer class actions have been "wrongly" dismissed "based on not having exhausted all *administrative* remedies." CCAA's Statement of Motives for Amendment of 2002 (emphasis added). (M.B.App.16-17). For this reason, the Puerto Rico Legislature opted to "clarify" that the "Court" has "exclusive primary jurisdiction, this being a *special cause of action.*" *Id.*

C. The district court decided *sua sponte* that a cause of action based on section 259(a) requires 'competitive' injury.

Although no such defense was ever raised, the district court dismissed with prejudice the Consumer Class Action for Unfair Trade Practices on grounds that the petitioner Diaz failed to allege 'competitive' injury. (App. 13a). And being such a question of first impression under Puerto Rico law, the court opted to rely upon the case law of the federal Sherman Act, section 1 and of the parallel Puerto Rico antitrust section 258 — each of which proscribes the unreasonable "restraint" of trade or commerce by means of any contract, combination or conspiracy.

Moreover, the district court plainly "denied" the petitioner's motion for reconsideration which pointed to the legislative history clearly declaring that when section 259(a) was enacted in 1964 it was patterned *not* on the Sherman Act, but, instead, on the Federal Trade Commission Act's section 5. And because the Puerto Rico Legislature *explicitly* adopted also the holding in "*F.T.C. v. R. F. Keppel and Bro., Inc.*, 291 U.S. 304, 312 (1934)," (M.B. 23), Diaz advised that — as resolved in *Keppel* under section 5 of the FTC Act — the parallel section 259(a) was enacted to not only protect

competitors, but to also protect "consumers."

Besides, under Puerto Rico law when a statute is adopted from other jurisdiction it includes the construction given until then by such jurisdiction's courts unless the said interpretation conflicts with the Puerto Rico "legal tradition" or "sense of justice." *P.R. Fuels, Inc. v. Empire Gas Co., Inc.*, 149 D.P.R. 691, 707-708, 714-716 (1999). (C.T. 12-14, 22-25).

Anyway, this Court has already explained that the *Keppel* judicial construction was legislatively adopted in 1938 when Congress amended the FTC Act in order to clarify that its section 5 proscribes not only the "unfair methods of competition," but also the "unfair or deceptive acts or practices." *F.T.C. v. Sperry and Hutchinson Co.*, 405 U.S. 233, 239-240 (1972). [5]

D. The appellate court affirmed on the different ground that the Consumer Class Action Act does not provide a "private right of action" against unfair trade practices.

Rather than resolving the competitive-injury question that the district court raised and decided *sua sponte*, the court of appeals affirmed the dismissal on the following rationale:

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[5] *See* (M.B. 21-23, 32-36, 58-60), citing also *Chuck's Feed & Seed Co., Inc. v. Ralston Purina Co.*, 810 F. 2d 1289, 1292 (4th Cir. 1987) which held that like the parallel section 5 of the FTC Act, the South Carolina unfair-practice law is equally aimed at those "two distinct kinds of conduct." *Ralston* further held that a practice need not violate the Sherman Act in order to violate the FTC Act. *Id.*, 1293. Cf. *People ex rel. Mosk v. National Research Co.*, 201 Cal. App. 2d 765, 771, 773 (1962) and *Barquis v. Merchants Collection Assn.*, 7 Cal. 3d 94, 110 (1972) holding that, likewise to the similar section 5 of the FTC Act, the California unfair-practice law does not require to show 'competitive' injury.

> The Antitrust Act *expressly* prohibits a private right of action for suits brought under section 259(a), and nothing in the CCAA — a *procedural* class action statute — provides any indication that the Puerto Rico legislature intended to create a *substantive* right of action for class action suits pursuant to section 259(a).

(App. 8a-9a) (emphasis added).

Thus notwithstanding that the Puerto Rico Civil Code ordains that when the "letter" of a statute is clear it cannot be disregarded under the pretext of fulfilling its "spirit" (Title 31, §§ 14, 19), the court still construed that "Diaz reads too much into the CCAA's *explicit* statement that it recognizes a right for consumers to file a class action based on sections *257 through 274* of the Antitrust Act." (App. 6a) (emphasis added).

First, the court pointed to the antitrust section 268, the letter of which — according to the court — "explicitly" precludes *any* private right of action in "Court" against unfair trade practices. (App. 4a). Even when section 268 only states that:

> Any person who shall be injured in his business or property by any other person, by reason of acts or intended acts, forbidden or declared to be unlawful by the provisions of this chapter, except §§ 259 and 261 of this title, may sue therefor[] in the Court of First Instance *and shall recover threefold the damages by him sustained, plus costs, including a reasonable amount for attorney's fees.*

(App. 30a-31a) (emphasis added). However, by omitting

to mention and not considering the above highlighted language in italics (App. 4a), the court avoided to distinguish between an *individual* action under section 268 for "threefold" damages vis-a-vis a *class* action under the CCAA for "equal" damages — the latter of which is the amount sought by Diaz in his consumer class action complaint. (J.A. 13, 24). And the court did not say either that the legislative history clearly explains that the preclusion to recover "treble" damages against unfair trade practices under section 268, *cannot* affect the "right to file an ordinary action for damages" under "other principles of law." (R.B. 12) (R.B.App. 4).

Second, the court next concluded — but without explaining how it reached so — that the CCAA is merely "procedural." (App. 5a, 6a, 9a). And so, the court applied the "longstanding *precedent*" — based on Rule 23 of Federal Rules of Civil Procedure — stating that a claimant cannot "represent a class" unless he can "sue in his own right" (App. 5a); that "[t]he application of Rule 23 does not abridge, enlarge or modify any *substantive* right," *id.;* as well as establishing that "*procedural* class action provisions neither create substantive rights nor give rise to an independent cause of action." (App. 6a) (emphasis added). Consequently, the court held that because Diaz cannot pursue his unfair-practice claim *individually* in "Court" (App. 4a), he thus cannot recover as part of a "class." (App. 5a). [6]

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[6]The court also cited two decisions based on state class-action rules modeled on Rule 23. Yet, notwithstanding that the drafters codified the CCAA under the still-in-force provisions of the repealed *Code of Civil Procedure* — the history of which is succinctly explained in *Guzmán, supra* (App. 21a-22a, 28a) — the court did not consider that the implications of the CCAA are

Third — even though the court concedes that the CCAA was enacted to protect consumers against the "deceitful, improper, false or fraudulent practices" (App. 4a-5a) — it nonetheless construed that the "CCAA offers no indication that its drafters intended to create a right of action for violations of section 259(a)," which forbids all "unfair or deceptive acts or practices." (App. 6a, 30a). In so concluding, the court pointed to the CCAA's "Statement of Motives" declaring that "[m]any persons acting together as consumers who have been defrauded may enforce their *individual rights* by means of a consumer class suit." (App. 6a-7a) (emphasis added by the court). Thus, the court decided that "this statement indicates that rights must already exist at an individual level in order to support a class action." *Id.* However, the court forgot that the consumer has indeed an *individual right* to file a private suit in the Department of Consumer Affairs against "any unfair or deceitful act or practice." P.R. Laws Ann. Title 23, § 1005(g). (App. 31a). And the court even ignored the consumer's primary *right* of being free from the unfair trade practices plainly declared "unlawful." (App. 30a).[7]

Fourth, the court further justified its decision on grounds that "Diaz's contention that the CCAA

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substantive.

[7]The Civil Code (Title 31, §§ 2991 and 2992) declares that an *obligation* or *duty* is created by "law" or by an "illicit" act or omission, and that such a duty can consist of "not doing" something. The Puerto Rico Supreme Court held that where a statute imposes a "specific duty for the protection and benefit of others" the "neglect to perform such duty creates a liability for any resulting injury." *García Pagán v. Shiley*, 22 P.R. Offic. Trans. 183 (1988). See, e.g., *Kagan v. Gibraltar Sav. & Loan Ass'n*, 35 Cal.3d 582, 593 (1984), holding that because it is "unlawful" to engage in any unfair trade practice, the consumer has the corresponding "legal right not to be subjected thereto." (R.B. 4-6).

effectively serves as an *implied repeal* of section 268 violates established principles of statutory interpretation." (App. 7a-8a) (emphasis added). That is, even when Diaz *never* contended so. In fact, Diaz asserted exactly the opposite of what the court quoted him as saying. For instance, Diaz contended — in his reply brief under the section entitled "The class-wide remedies afforded by the Consumer Class Action Act are *not* in 'irreconcilable conflict' with the individual remedies precluded by the Antitrust Act" — that because the CCAA and the section 268 can be both "harmonized" and are "capable of coexistence," it is the "duty" of the court to "regard each as effective." (R.B. 19-20).

Finally, the appellate court opted not to "certify the issue of whether a private right of action exists to the Puerto Rico Supreme Court" because "the clarity with which the Puerto Rico legislature has spoken on this issue renders certification unnecessary and inappropriate." (App. 8a).

And so, the appellate court opted not to "consider" — although it was pressed by respondent and fully briefed by both parties — whether the NHTSA's regional-recall "non-binding policy" *impliedly* preempts the CCAA's "special cause of action" against unfair trade practices. (App. 8a).

E. The appellate court's construction of the Consumer Class Action Act did *not* consider the Puerto Rico Supreme Court's intervening and conflicting interpretation of this state law.

Nowhere in the *Diaz* decision it is mentioned, much less discussed, the case of *Guzmán v. Vaquería*,

2006 TSPR 187 — whereby the Puerto Rico Supreme Court recently construed the CCAA in *conflict* with the federal court's interpretation.

Even though the *Guzmán* decision was handed down on December 14, 2006 — after both petitioner and respondent had already filed their respective main briefs in the court of appeals — the petitioner Diaz did advise the federal court about the *Guzmán* opinion immediately after it became published. Indeed, Diaz even included a certified translation with his reply brief (filed on January 22, 2007). (R.B.App. 6-16) (App. 21a-28a). Such notification amounts to more than six (6) months in advance to when the appellate court handed down the *Diaz* decision.

So far, apart from the specific point discussed in the *Western* case, *supra*, *Guzmán v. Vaquería* constitutes the *only published* opinion where the Puerto Rico Supreme Court fully explores the CCAA's contours.

REASONS FOR GRANTING PETITION

The federal-court nullification of the Consumer Class Action for Unfair Trade Practices deprives the 4 million consumers in Puerto Rico of a well gained and deserved state-created "right."

Even though a federal court's decision on a question of state law is not binding on state tribunals, with the recent enactment of the Class Action Fairness Act (CAFA) — and its sweeping jurisdictional provisions — the "plainly wrong" holding in this diversity action will indeed set a binding precedent for the great majority of consumer class actions involving the residents of Puerto Rico.

By denying the petitioner's request for

certification, the appellate court also deprived the highest court of Puerto Rico from deciding and settling a matter that involves an extremely important question of local policy.

But those are not the only reasons why this petition should be granted.

I. Because for purposes of *Erie*, *Hanna* and progeny the Consumer Class Action Act (CCAA) is "substantive," the federal court is bound to enforce such Puerto Rico law in this diversity action brought under the CCAA provisions.

A. The CCAA requires the consumers to sue as a "class" in order to enforce their *common* interest in the collection of the CCAA-created *single* liability.

The CCAA grants to consumers an *integrated* "right" to recover their class-wide damages caused by any unfair trade practice. Specifically, the CCAA recognizes the consumers' "right" to file a "class" suit directly in "Court" based on the antitrust sections "257-274," and thus "based" on the section 259(a) that forbids all unfair trade practices. (App. 29a, 30a). As said before, the consumer has also the right to file a private *individual* suit in the Department of Consumer Affairs against such illegal practices. P.R. Laws Ann. Title 23, §1005(g) (App. 31a). However, the remedies provided by this governmental agency are "inadequate" and "not sufficient."*Guzmán v. Vaquería, supra* (App. 23a). Therefore, in order to solve such a "limitation," *id.*, the Puerto Rico Legislature enacted the CCAA and thus provided to consumers the "right" to recover "equal"

class-wide damages plus mandatory prejudgment interests, costs and statutory counsel fees (apart from availing a class-wide injunctive relief). P.R. Laws Ann. Title 32, § 3343 (App. 29a-30a). In other words, the CCAA entitles the consumers to get the "additional remedies" that are "established therein" only. *Guzmán, supra* (App. 25a, 27a).

And so, by recognizing this *integrated* "right" of recovery against unfair trade practices, the CCAA further creates a *new* independent obligation or liability. For instance — under the antitrust section 268 — the supplier of goods and services has *no* obligation to pay "*threefold*" damages to the *individual* consumer injured by the supplier's unfair trade practices. P.R. Laws Ann. Title 10. (App. 30a-31a) (emphasis added). However — under the CCAA section 3343 — the supplier does have the obligation to pay an amount "*equal*" to the class-wide damages caused by such illegal practices. P.R. Laws Ann. Title 32. (APP. 29a-30a) (emphasis added). Likewise, even though the antitrust section 268 does not require the supplier to pay *prejudgment interests*, the CCAA otherwise imposes to the supplier the additional obligation of paying "legal interest from the moment the damage is caused" to the consumer class. *Id.* On the same token, although the supplier must pay a "reasonable amount" for *attorney's fees* under section 268, the CCAA, instead, imposes to the supplier of goods and services a new obligation to pay "not less than 25%" of all the class recovery as counsel fees. *Id.* In sum, the CCAA requires the consumers to unite as a class not just to jointly enforce in "Court" the section 259(a), but to collectively secure the *single* class recovery or common fund upon which all class members share a *common* and *undivided* interest.

One factor that defines a "common and undivided interest" is when the class members' "claims constitute in their totality an *integrated right* against the defendants." *Berman v. Narragansett Racing Assoc.*, 414 F.2d 311 (1st Cir.1969), cert. denied, 396 U.S. 1037, 90 S.Ct. 682, 24 L.Ed.2d 681 (1970) (emphasis added). A second factor is that the defendant has no interest in how the claim is distributed among the class members. *Id.*, at 316. And a third "identifying characteristic of a common and undivided interest is that if one plaintiff cannot or does not collect his share, the shares of the remaining plaintiffs are increased." *Sellers v. O'Connell*, 701 F.2d 575, 579 (6th Cir.1983). All these factors define the CCAA's 259-based "special cause of action."

First, the consumers injured by the suppliers' unfair trade practices have an *integrated* "right" to recover as a "class." For even though the consumers so injured may file private *individual* suits in the governmental agency, in order to avail themselves of the CCAA's "additional" remedies, the CCAA requires them to unite and sue collaboratively through a "class" action suit. In other words, the CCAA allows the consumers to file a suit directly in "Court" — without having to "exhaust[] all *administrative* remedies — but *only* by means of the class-action mechanism. CCAA's Statement of Motives for Amendment of 2002 (emphasis added). (M.B.App.16-17). Simply put, they cannot obtain the CCAA's extended remedies unless they sue in "Court" as a class. And so, the class members share a *common* title or "integrated right against the defendants." *Berman, supra.*

Second, the suppliers of goods and services that are liable for any damaging unfair trade practice have no interest in how the claim is distributed among the

class members recovering through the CCAA provisions. *Id.* For the distribution of the class recovery takes place by way of a legal "Trust Fund" that is "used according to an order issued by the sentencing court." Title 23, § 1017 (App. 32a).

Finally, because the unclaimed share of the class recovery accrues to the benefit of all class members, the third characteristic of a "common and undivided interest" also defines the CCAA-created Consumer Class Action for Unfair Trade Practices. *See id.*, § 1016(b), ordaining that after one year any unclaimed amount in the "Trust Fund" must be used by either the Department of Consumer Affairs or the Department of Justice "in initiating future actions for the protection of the consumers." (App. 31a).

Thus, the CCAA requires the consumers to sue as a "class" for them to be able to enforce their *common* interest in the collection of the CCAA-created *single* liability (that is, the common recovery fund).

B. The scope of Federal Rule 23 is not "sufficiently broad" to "control" the disputed point of whether the consumers in Puerto Rico are entitle to *collectively* enforce the Unfair Trade Practice law 259(a) and obtain *class* recovery.

The appellate court relied upon "Rule 23" decisions as "precedent" for the proposition that "*procedural* class action provisions neither create *substantive rights* nor give rise to an independent *cause of action.*" (App. 6a) (emphasis added). However, such federal decisional law is not controlling in this diversity action based on Puerto Rico law.

At the outset, the court erred in concluding that

the CCAA is merely "procedural." (App. 9a). For as discussed before, the CCAA creates not only a right of recovery but also a new liability. Indeed, another appellate court recently held that it is "well settled" that the obligation to pay "prejudgment interest" — as imposed by the CCAA — is a "*substantive*" aspect of a plaintiff's claim, and thus is not merely "procedural." *In re the Exxon Valdez*, 484 F.3d 1098, 1101 (9th Cir. 2007) (emphasis added).[8]

Even so, the scope of Fed.R.Civ.P. 23 is not sufficiently broad to control the issue of whether the CCAA entitles, or not, the consumers in Puerto Rico to collectively enforce their common interest in the collection of the CCAA-created single liability. That is, whether the CCAA creates, or not, an integrated "right" to recover or a "cause of action" against unfair trade practices.

On its face, the Rule 23 "merely establishes the procedures for pursuing a class action in the federal courts." *Wade v. Danek Med., Inc.*, 182 F.3d 281, 290 (4th Cir.1999). Specifically, it sets forth the circumstances under which "[o]ne or more members of a class may sue or be sued as representative parties," but makes no reference to the *remedies* that representative parties may seek. *See* Fed.R.Civ.P. 23. In addition, Rule 23, like all Federal Rules, must be interpreted "with sensitivity to important state

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[8]The Puerto Rico Supreme Court — in an unpublished opinion authored by the then Chief Justice José A. Andreu García (who recently joined the petitioner's legal representation to help research and frame the questions hereby presented) — defined that the CCAA is a "unique, cutting-edge legislation" that "created the *substantive* right" to file a direct and private suit through the class action mechanism. *Trilla v. Torres*, CC-2001-661 (emphasis added). (MB. 25). (M.B.App. 20). (R.B. 17). (C.T. 63).

interests and regulatory policies" that may be frustrated by the application of federal procedures. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 428 n. 7, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996).

In contrast to Rule 23, the Consumer Class Action Act (CCAA) is a statement of a "*substantive* decision" by the Commonwealth of Puerto Rico that the consumers' integrated "right" in the recovery of the CCAA-created single liability constitutes an "integral part" of the several "policies" served by the quintessential consumer-protection statute, that is, the Antitrust Act's Unfair Trade Practice law 259(a). *See Walker v. Armco Steel Corp.*, 446 U.S. 740, 751,100 S.Ct. 1978, 1985 (1980) (emphasis added). Indeed, the drafters created the CCAA to protect the consumers against the "deceitful, improper, false or fraudulent practices" by "the suppliers of goods and services." (App. 5a). To that end, the CCAA "grants the consumers a broad and effective instrument to protect their rights." *Guzmán, supra* (App. 25a). Consequently, by availing the collective enforcement of section 259(a) through the Consumer Class Action, the CCAA gives rise to a "special *cause of action* based upon the urgent interest of the Commonwealth of Puerto Rico in protecting consumers." CCAA's Statement of Motives for Amendment of 2002 (emphasis added). (M.B.App.16-17). Additionally, the courts must construe and apply together the CCAA and the section 259(a) in light of the harm that both statutes are meant to remedy. *See* Civil Code, Title 31, §18 (ordaining that the laws that refer to the "same matter" or whose "object is the same" must be read together). Basically, because when the drafters patterned section 259(a) on the FTC Act section 5, they *explicitly* adopted the holding in "*F.T.C. v. R. F. Keppel and Bro., Inc.*, 291 U.S. 304, 312 (1934)."

(M.B. 23). And so, the Unfair Trade Practice law 259(a) was likewise intended to protect "consumers." *Id.*

In light of the text and policies of the provisions, the appellate court erred in relying upon "Rule 23" decisions as "precedent," and thus implying that the scope of this Federal Rule is "sufficiently broad" to "control" the *remedial* issues governed by the CCAA. *See*, e.g., *Walker*, *supra*, at 749-750. The Rule 23 does not replace the mentioned "policy" determinations found in the Puerto Rico law. *Id.*, at 752. Conversely, Rule 23 and the CCAA "may both apply in federal court in a diversity action," for both "can exist side by side, therefore, each controlling its own intended sphere of coverage without conflict." *Id.* Indeed, in *Guzmán v. Vaquería*, *supra*, the Puerto Rico Supreme Court applied the CCAA as well as the Puerto Rico Rules of Civil Procedure, Rule 20 — the state-law corollary to the Federal Rule 23. [9]

And so, "there being no Federal Rule which cover[s] the point in dispute, *Erie* command[s] the enforcement of state law." *Walker*, 446 U.S., at 750, citing *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965). Especially, because not enforcing such state law would result in an inequitable "administration of the law." *Id.*, at 753, citing *Hanna*, at 468. There is simply no reason why, in the absence of a controlling federal rule, an action based on state law that would be allowed in the state courts to proceed through litigation to judgment, should be barred in federal court solely because of the fortuity that there is

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[9]Additionally, since the "Rule 23" decisions (upon which the court relied) are *distinguishable* from the *Guzman* decision that interprets the CCAA, the petitioner will eventually raise this point if necessary.

diversity of citizenship between the litigants. *Id.* "The policies underlying diversity jurisdiction do not support such a distinction between state and federal plaintiffs, and *Erie* and its progeny do not permit it." *Id.*

Thus, because for purposes of *Erie*, *Hanna* and progeny the Consumer Class Action Act (CCAA) is "substantive," the federal court is bound to enforce such Puerto Rico law in this diversity action brought under the CCAA provisions.

II. The federal-court nullification of Puerto Rico's Consumer Class Action for Unfair Trade Practices compels a reversal in light of established precedents.

A federal court is bound by the highest state court's construction and interpretation of a state statute. *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); *Rochester Lincoln-Mercury, Inc. v. Ford Motor Co.*, 248 F.3d 46 (1st Cir. 2001). Federal courts lack jurisdiction to place a construction on a state statute different from the one rendered by the state's highest court, whether the state rule is procedural or substantive. *Johnson v. Fankell*, 520 U.S. 911, 117 S. Ct. 1800, 138 L. Ed. 2d 108 (1997). Rather, federal courts must accept a state court's construction of a state statute. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 121 S. Ct. 471, 148 L. Ed. 2d 366 (2000). The rule that federal courts are bound to a highest state court's interpretation and construction of a state statute applies, even though the construction given to the statute by the state court may differ from the construction which the federal court, if it were exercising its own independent judgment, would give

thereto. *Jones v. Prairie Oil & Gas Co.*, 273 U.S. 195, 47 S. Ct. 338, 71 L. Ed. 602 (1927). The rule also applies even though a similar provision of a federal statute has been differently construed by the federal court. *Detroit & M. Ry. Co. v. Fletcher Paper Co.*, 248 U.S. 30, 39 S. Ct. 13, 63 L. Ed. 107 (1918). And the rule applies even though the statute is similar to a statute in another state whose courts construed the statute of their state otherwise. *Doherty v. Tremblay*, 298 U.S. 676, 56 S. Ct. 941, 80 L. Ed. 1398 (1936); *Doherty v. Bartlett*, 83 F.2d 259 (1st Cir. 1936). Indeed, in analyzing a state statute, federal courts are bound by state rules of statutory construction. *In re Reaves*, 285 F.3d 1152 (9th Cir. 2002). For review purposes, the enactment of 28 U.S.C. § 1258 accords to the Supreme Court of Puerto Rico the status of the highest court of a state. *See* also *Figueroa v. People of Puerto Rico*, 232 F.2d 615, 618 (1st Cir. 1956).

In *Leavitt v. Jane L.*, this Court held that even thought it does not normally grant petitions for certiorari solely to review what purports to be an application of state law, the Court has done so, "and undoubtedly should do so where the alternative is allowing blatant *federal-court nullification of state law*." *Id.*, 518 U.S. 137, 144-145,116 S.Ct. 2068 (1996) (per curiam) (citations omitted) (emphasis added). And even if a presumption of deference is given the views of a federal court as to the law of a State within its jurisdiction, in light of the discussed in this petition, such a "deference [is] inappropriate here." *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 757, 125 S.Ct. 2796 (2005), citing *Leavitt*, at 145. For it is obvious that the court of appeals' state-law ruling is "plainly wrong." *Id.*

III. The Puerto Rico Supreme Court's *intervening* and *conflicting* precedent in *Guzmán v. Vaquería, supra*, compels a GVR order for further consideration pursuant to 28 U.S.C. § 2106.

Under 28 U.S.C. § 2106, this Court may grant the certiorari petition, vacate the lower court's judgment, and remand the case (GVR) for further consideration. Such GVR order is appropriate when the court of appeals' decision is based on a state-law construction that appears to contradict a recent decision of the highest state court. *Lords Landing Village Condominium Council of Unit Owners v. Continental Ins. Co.*, 520 U.S. 893, 117 S.Ct. 1731 (1997) (per curiam), and other cases therein cited.

The GVR order is also appropriate where this Court have reasons to believe that the court of appeals did "not fully consider" a "recent development." For it reveals a "reasonable probability" that the decision below rests upon a premise that the appellate court would reject if given opportunity for "further consideration," and where it appears that redetermination may determine the ultimate outcome of the litigation. *Lawrence v. Chater*, 516 U.S. 163, 167, 116 S.Ct. 604, 607, 133 L.Ed.2d 545 (1996) (per curiam).

Accordingly, the Puerto Rico Supreme Court's intervening and conflicting precedent in *Guzmán v. Vaquería, supra*, compels a GVR order for further consideration pursuant to 28 U.S.C. § 2106 and this Court's precedents.

CONCLUSION

For the foregoing reasons, the petition for a writ

of certiorari should be granted.

Respectfully submitted,

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No. 06-2026

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RAFAEL DIAZ-RAMOS,
Plaintiff, Appellant,
v.
HYUNDAI MOTOR COMPANY and HYUNDAI AMERICAN TECHNICAL CENTER, INC.
Defendants, Appellees.

August 30, 2007, Decided

COUNSEL: Jorge M. Torrez-Gomez, with whom Vicente Santori-Coll and Torres-Gomez Law Office were on brief, for appellant.

Gene C. Schaerr, with whom Peter K. Dykema, Geoffrey P. Eaton, Brian P. Brosby, Robert Scumaci, Winston & Strawn, LLP, and Gibson, McAskill, & Crosby, LLP were on brief, for appellees.

JUDGES: Before Lipez, Circuit Judge, Selya, Senior Circuit Judge, and DiClerico, * District Judge.

LIPEZ, *Circuit Judge.* The claim that appellant Rafael Diaz-Ramos ("Diaz") brings against Hyundai Motor Company ("HMC") is predicated on the notion that section 259 of the Puerto Rico Antitrust Act, P.R. Laws Ann. tit. 10, § 259 ("Antitrust Act"), in conjunction with the Consumer Class Action Act, P.R. Laws Ann. tit. 32, §§ 3341-3344 ("CCAA"), affords a private right of action to an individual who seeks to represent a class of injured parties. In light of the explicit statutory

language, longstanding precedent regarding class actions, legislative history, and established principles of statutory interpretation, we hold on these facts that no such private right of action exists and affirm the district court's decision to dismiss Diaz's complaint.

I.

The relevant facts are undisputed. In 1998 and 2002, HMC launched recall campaigns for 1995 through 1997 Hyundai Accents to remedy suspension problems that could result from corrosion caused by road salt. The recalls took place in the states within a "salt belt" region designated by the National Highway Traffic Safety Administration.

Diaz owns a 1995 Hyundai Accent and is a citizen and resident of Puerto Rico. His car was not included in the recalls because Puerto Rico is not within the designated region. Believing that the "marine salt environment" of Puerto Rico could induce severe corrosion damage (similar to that caused by road salt) to Hyundai Accents in Puerto Rico, and that his car thus should have been included in the recall, Diaz filed a proposed consumer class action suit in 2005 against HMC and Hyundai American Technical Center, Inc. ("HATCI") pursuant to section 259 of the Antitrust Act; section 3342 of the CCAA; the Puerto Rico Motor Vehicle Act, P.R. Laws Ann. tit. 10, §§ 2060, 2064; and Puerto Rico's general tort statute, P.R. Laws Ann. tit. 31, § 5141.

HMC moved to dismiss Diaz's action for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), and HATCI moved to dismiss for lack of in personam jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2) and for improper venue

pursuant to Federal Rule of Civil Procedure 12(b)(3). The district court granted both motions to dismiss. With respect to HMC's motion, it explained that "[a] cause of action under the Antitrust laws . . . generally requires the plaintiff to show that the defendant engaged in conduct that has a negative impact upon the free flow of trade and commerce and not merely that the defendant may have put a defective product on the market and refuses to correct it," and concluded that Diaz had not alleged that his exclusion from the recalls adversely affected trade and commerce. The court also held that Diaz had not stated a claim under Puerto Rico's Motor Vehicle Act or the general tort statute because he had not alleged that he suffered any actual injury from his exclusion from the recalls. Then, with respect to HATCI, the court concluded that "Diaz cannot show that HATCI has in any way purposely entered the Puerto Rico market," and, consequently, it lacked personal jurisdiction over HATCI.

On appeal, Diaz presses only his claim pursuant to section 259 of the Antitrust Act.[1]

II.

We exercise de novo review over a dismissal pursuant to Rule 12(b)(6), "assuming the truth of all well-pleaded facts . . . and indulging all reasonable inferences in the plaintiff's favor." *Nisselson v. Lernout*, 469 F.3d 143, 150 (1st Cir. 2006). Thus, a complaint should be dismissed for failure to state a claim "only if the facts lend themselves to no viable theories of recovery." *Phoung Luc v. Wyndham Mgmt. Corp.*, F.3d , 496 F.3d 85, 2007 U.S. App. LEXIS 18691, 2007 WL 2253527, at *2 (1st Cir. Aug. 7, 2007).

The district court dismissed Diaz's complaint because he failed "to show that the defendant engaged in conduct that has a negative impact upon the free flow of trade and commerce," as required by section 259(a) of the Antitrust Act.[2] We conclude, however, that a more fundamental problem undermines Diaz's complaint. The Antitrust Act explicitly states that there is no private right of action for a violation of section 259(a), and Diaz's attempt to find such a right of action in the CCAA is unavailing.

Section 268 of the Antitrust Act states that "[a]ny person who shall be injured in his business or property by any other person, by reason of acts or intended acts, forbidden or declared to be unlawful by the provisions of this chapter, *except §§ 259 and 261 of this title*, may sue therefor[] in the Court of First Instance." P.R. Laws Ann. tit. 10, § 268(a)(emphasis added). This plain language is reinforced by *San Juan Star Co. v. Casiano Commc'ns, Inc.*, 85 F. Supp. 2d 89, 93 & n.3 (D.P.R. 2000), in which the court dismissed with prejudice a private action after reaching the "inescapable conclusion" that the Antitrust Act "do[es] not provide a private right of action" under section 259.

Not so easily rebuffed, Diaz insists that the CCAA provides the private right of action that the Antitrust Act explicitly denies. The relevant provision of the CCAA "recognize[s] the right . . . to consumers of goods and services . . . to file a class suit on behalf of said . . . consumers," including "a class suit . . . based on the Antitrust Act of the Commonwealth, §§ 257-274 of Title 10." P.R. Laws Ann. tit. 32, § 3342. He argues that, because the Antitrust Act and the CCAA deal with the same subject, courts must apply them together, bearing in mind the fundamental objectives of both statutes. The CCAA was enacted to protect consumers against

the "deceitful, improper, false or fraudulent practices" by "the suppliers of goods and services." Act of June 25, 1971, No. 118 (Statement of Motives). This purpose, Diaz explains, favors the interpretation that the CCAA was intended to allow a private right of action for commission of the unfair trade practices described in section 259 of the Antitrust Act.

No authority supports Diaz's claims. First, courts have repeatedly held that the "predicate to [a plaintiff's] right to represent a class is his eligibility to sue in his own right. What he may not achieve himself, he may not accomplish as a representative of a class." *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 734 (3d Cir. 1970). Both state and federal class action provisions have been construed to confer no substantive rights. *See, e.g., Kristian v. Comcast Corp.*, 446 F.3d 25, 54 (1st Cir. 2006) ("While Comcast is correct when it categorizes the class action . . . as a procedure for redressing claims - and not a substantive or statutory right in and of itself - we cannot ignore the substantive implications of this procedural mechanism."); *Cummings v. Connell*, 402 F.3d 936, 944 (9th Cir. 2005)("It is axiomatic that Rule 23 cannot 'abridge, enlarge or modify any substantive right' of any party to the litigation." (quoting 28 U.S.C. § 2072)); *Blaz v. Belfer*, 368 F.3d 501, 504 (5th Cir. 2004)("A class action is merely a procedural device; it does not create new substantive rights." (quoting *Frazar v. Gilbert*, 300 F.3d 530, 545 (5th Cir. 2002)), *rev'd on other grounds sub nom., Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 124 S. Ct. 899, 157 L. Ed. 2d 855 (2004)); *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 346 (7th Cir. 1997)(stating that "[t]he application of Rule 23 does not abridge, enlarge or modify any substantive right"); *In re Baldwin-United Corp.*, 770 F.2d 328, 335 (2d Cir.

1985)(stating that the federal class-action procedure set forth in Rule 23 "is a rule of procedure and creates no substantive rights or remedies enforceable in federal court"); *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425, 437 (Tex. 2000) (holding that class action is procedural device which does not alter the substantive requirements of the underlying substantive claim); *Winters v. Kan. Hosp. Serv. Ass'n*, 1 Kan. App. 2d 64, 562 P.2d 98, 101 (Kan. App. 1977)(stating that Kansas' class-action statute "is a procedural statute" that "creates no substantive rights").

Thus, the courts that have considered the issue have held that procedural class action provisions neither create substantive rights nor give rise to an independent cause of action. We have found no case contrary to this holding, and we have no basis for concluding that Puerto Rico would deviate from this unanimous authority. We also think that Diaz reads too much into the CCAA's explicit statement that it recognizes a right for consumers to file a class action based on sections 257 through 274 of the Antitrust Act. The specified sections encompass the entirety of the Antitrust Act and offer no indication that the legislature intended to override section 268's more specific statement that section 259 does not support a private right of action. In sum, the right to file a class action cannot exist where -- as with section 259 -- the Antitrust Act does not already afford an individual right.

Moreover, the legislative history of the CCAA offers no indication that its drafters intended to create a right of action for violations of section 259(a). No specific statement implies such an intent. Indeed, the Statement of Motives accompanying the CCAA explains that "[m]any persons acting together as

consumers who have been defrauded may enforce their *individual rights* by means of a consumer class suit." Act of June 25, 1971, No. 118 (Statement of Motives). Not surprisingly, this statement indicates that rights must already exist at an individual level in order to support a class action.

Finally, Diaz's contention that the CCAA effectively serves as an implied repeal of section 268 violates established principles of statutory construction. As the Supreme Court of Puerto Rico has stated: "The courts do not favor implied repeals. A general law does not repeal a special law unless such repeal is expressly stated or clearly arises from the legislative intent." *McCrillis v. Aut. Navieras de P.R.*, 23 P.R. Offic. Trans. 109, 123 P.R. Dec. 113, 1989 Juris P.R. 6 (P.R. 1989)(citation omitted). This authority is aligned with the predominant understanding. The Supreme Court has explained that "'when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44, 122 S. Ct. 593, 151 L. Ed. 2d 508 (2001) (quoting *Morton v. Mancari*, 417 U.S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974)). Moreover, "absent a clearly expressed congressional intention, repeals by implication are not favored. An implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter act covers the whole subject of the earlier one and is clearly intended as a substitute." *Branch v. Smith*, 538 U.S. 254, 273, 123 S. Ct. 1429, 155 L. Ed. 2d 407 (2003)(plurality opinion)(internal quotation marks and citations omitted); *see also* Morton, 417 U.S. at 550 ("[T]he only permissible justification for a repeal by implication is when the

earlier and later statutes are irreconcilable."). Here, section 268(a) is not irreconcilable with the CCAA; rather, the statutes easily may be harmonized by interpreting the CCAA to leave untouched section 268(a)'s statement that section 259 does not support a private right of action. Similarly, the CCAA neither covers the same subject as section 268(a) nor is clearly intended as a substitute. The CCAA prescribes procedures for consumer class actions, while the latter prescribes substantive standards governing monopolies and restraint of trade. In the absence of any evidence of legislative intent to repeal section 268(a), we find that no such implied repeal took place here.

In the alternative, Diaz asks that we certify the issue of whether a private right of action exists to the Puerto Rico Supreme Court. However, we have held that certification is "inappropriate" if "the course state courts would take is reasonably clear." *Porter v. Nutter*, 913 F.2d 37, 41 n.4 (1st Cir. 1990)(quoting *Bi-Rite Enters., Inc. v. Bruce Miner Co.*, 757 F.2d 440, 443 n.3 (1st Cir. 1985)). Here, the clarity with which the Puerto Rico legislature has spoken on this issue renders certification unnecessary and inappropriate. And, because our conclusion that no private right of action exists wholly disposes of Diaz's claim, we need not consider HMC's defense that the Antitrust Act is preempted by the National Traffic and Motor Vehicle Safety Act, 49 U.S.C. §§ 30101-30169.

III.

We conclude that the district court correctly dismissed Diaz's claims under the Antitrust Act and the CCAA. The Antitrust Act expressly prohibits a private right of action for suits brought under section 259(a),

and nothing in the CCAA -- a procedural class action statute -- provides any indication that the Puerto Rico legislature intended to create a substantive right of action for class action suits pursuant to section 259(a). Thus, the district court was correct in granting HMC's motion to dismiss.

Affirmed.

Footnotes

*Of the District of New Hampshire, sitting by designation.

1On appeal, Diaz does not challenge the district court's conclusion that it lacked personal jurisdiction over HATCI. Thus, as far as we can discern from the record now before us, HATCI remains in the appeal only nominally.

2In pertinent part, section 259(a) of the Antitrust Act states: "Unfair methods of competition, and unfair or deceptive acts or practices in trade or commerce are hereby declared unlawful." P.R. Laws Ann. tit. 10, § 259(a).

CIVIL NO. 05-1193 (JAG)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

RAFAEL DIAZ RAMOS, Plaintiff(s) v. HYUNDAI MOTOR COMPANY, et al., Defendant(s)

May 19, 2006, Decided

COUNSEL: For Jorge M. Torres-Gomez, Torres Gomez Law Offices, San Juan, PR, PLAINTIFFS: Vicente Santori-Coll, Vicente Santori Coll Law Office, San Juan, PR

For PHV Brian P. Crosby, Gibson, McAskill & Crosby, Buffalo, NY, DEFENDANTS: Keith A. Graffam, Graffam & Biaggi, San Juan, PR

JUDGES: JAY A. GARCIA-GREGORY, United States District Judge

OPINION AND ORDER

On February 15, 2005, plaintiff Rafael Diaz Ramos ("Diaz") filed this proposed consumer class action suit against defendants Hyundai Motor Company, ("HMC") and Hyundai America Technical Center, Inc. ("HATCI") pursuant to the Puerto Rico Antitrust Act, *P.R. Laws Ann. 10 § 259*, the Puerto Rico Motor Vehicle Act, *P.R. Laws Ann. 10 § 2060 & 2064*, and Puerto Rico's general tort statute Art. 1802, *P.R. Laws Ann. 31 § 5141* (Docket No. 1). On October 7, 2005, HMC moved to dismiss Diaz's claims for failure to state a claims pursuant to *Fed.R.Civ.P. 12(b)(6)*(Docket No. 14). On

the same date, HATCI moved to dismiss Diaz's claims against it for lack of *in personam* jurisdiction and for improper venue pursuant to *Fed.R.Civ.P. 12(b)(2)&(3)*(Docket No. 15). On December 15, 2005, Diaz filed his opposition to HATCI's motion (Docket No. 24), and on December 20, 2005 to HMC's motion (Docket No. 25). For the reasons discussed below, the Court **GRANTS** HMC's and HATCI's motions to dismiss.

FACTUAL BACKGROUND

In 1996, HMC conducted a recall campaign in Puerto Rico for its Hyundai Accent vehicles for model years 1995 through 1997 due to a welding defect with the vehicles' suspension system. In 1998 and in 2003, HMC conducted a partial recall campaign for the same vehicles limited only to the "Salt-Belt States", a group of twenty states where salt is used to de-ice roads during the winter months, due to corrosion problems in the vehicles' suspension system. Diaz now files this suit on behalf of all owners of 1995-1997 Hyundai Accent vehicle owners in Puerto Rico, seeking to challenge HMC's and HATCI's failure to include Puerto Rico in the 1998 and 2003 recalls. Diaz argues that because the environmental conditions in Puerto Rico are also especially conducive to corrosion, the same safety conditions which prompted the recalls in the "Salt-Belt States" could occur here.

DISCUSSION

A. *Motion to Dismiss Standard*

Pursuant to *Fed.R.Civ.P. 12(b)(6)*, a complaint may not be dismissed unless it appears beyond doubt that

plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *See Brown v. Hot, Sexy, and Safer Prods., Inc., 68 F.3d 525, 530 (1st Cir. 1995).* The Court accepts all well-pleaded factual allegations as true, and draws all reasonable inferences in plaintiff's favor. *See Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 51 (1st Cir. 1990).* The Court need not credit, however, "bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like" when evaluating the Complaint's allegations. *Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996).* When opposing a *Rule 12(b)(6)* motion, "a plaintiff cannot expect a trial court to do his homework for him." *McCoy v. Massachusetts Institute of Tech., 950 F.2d 13, 22 (1st Cir. 1991).* Plaintiffs are responsible for putting their best foot forward in an effort to present a legal theory that will support their claim. *Id. at 23* (*citing Correa-Martinez, 903 F.2d at 52*). Plaintiffs must set forth "factual allegations, either direct or inferential, regarding each material element necessary to sustain recovery under some actionable theory." *Gooley v. Mobil Oil Corp., 851 F.2d 513, 514 (1st Cir. 1988).*

B. *HMC's Motion to Dismiss*

HMC argues in its motion that plaintiff's claims must be dismissed because (1) plaintiff has not alleged a cognizable injury, (2) plaintiff's claims under Puerto Rico law are preempted by Federal law, and (3) plaintiff cannot support his claims under any of the cited Puerto Rico laws. Because it finds that plaintiff has failed to establish a cause of action under Puerto Rico law, the Court need not enter into a discussion of HMC's preemption and lack of injury arguments and will proceed under the assumption for purposes of this

opinion that Diaz can proceed under state law rather than Federal law.

First, Diaz premises his complaint on *§ 259* of Puerto Rico's Anti-Trust Act, which seeks to prevent any "unfair methods of competition and unfair or deceptive acts or practices in trade or commerce . . . ." *P.R. Laws Ann. 10 § 259(a)*. A cause of action under the Antitrust laws, however, generally requires the plaintiff to show that the defendant engaged in conduct that has a negative impact upon the free flow of trade and commerce and not merely that the defendant may have put a defective product on the market and refuses to correct it. *See, e.g., Pressure Vessels of Puerto Rico v. Empire Gas de Puerto Rico, 137 D.P.R. 497, 509, 1994 Juris P.R. 144 (1994)*("The cardinal purpose of [*P.R. Laws Ann. 10 § 258*] is to protect free competition."); *Euromodas, Inc. v. Zanella, Ltd., 368 F.3d 11, 17 (1st Cir. 2004)*("To create a trialworthy issue in a vertical restraint case brought pursuant to *section 1* of the Sherman Act, a plaintiff must make two showings: concerted action and harm to the competitive process."); *Recetas Por Menos, Inc. v. Five Development Corp., 368 F.Supp.2d 124, 132 (D.P.R. 2005)*("In order to establish an antitrust violation in the instant case Plaintiffs have to show that the alleged arrangement among Defendants has anti-competitive effects . . . ."). Diaz has not established, or even alleged, that HMC's decision to not include Puerto Rico in the 1998 and 2003 recalls somehow adversely affects trade and commerce. His claim is rather premised on the possible injury he might suffer if his vehicle malfunctions, which it has not. Thus, Puerto Rico's Antitrust laws can offer him no relief.

Second, Diaz alleges a cause of action under the Consumers Act, *P.R. Laws Ann. 32 §§ 3341 - 3344*.

These provisions, however, do not contain any substantive law, but rather are part of the Code of Civil Procedure and are limited to authorizing the filing of class actions by consumers for damages or against monopolies. A successful suit would still require that the plaintiff establish a viable cause of action under the appropriate statutes which, as discussed above, Diaz has failed to do.

Third, Diaz alleges a cause of action under the Motor Vehicle Act, *P.R. Laws Ann. 10 §§ 2060 & 2064*. These statutes establish that vehicle manufacturers shall be liable for any damages caused by certain defects in the vehicles (*§ 2060*) and that a manufacturer who violates any of the act's provisions could be subject to the provisions of the Antitrust Act (*§ 2064*). As it pertains to *§ 2060*, Diaz has not established that he has suffered any injury caused by a defect in his vehicle. Furthermore, while *§ 2064* authorizes the filing of complaints against manufacturers under the Antitrust laws for failure to comply with the Act's provisions, it still requires a viable Antitrust cause of action which, as discussed above, Diaz cannot establish.

Finally, Diaz alleges a cause of action under Art. 1802, *P.R. Laws Ann. § 5141*, Puerto Rico's general tort statute. A cause of action for tort damages, however, presupposes that the plaintiff has suffered an actual injury caused by defendant's fault or negligence. *See, e.g., Admor. F.S.E. v. Almacen Ramon Rosa, 151 D.P.R. 711, 725, 2000 Juris P.R. 122 (2000)*(To establish a cause of action for damages, plaintiff must show by preponderance of the evidence the reality of the injury suffered, the existence of a negligent act or omission, and the element of causality). In this case, Diaz has not alleged that he has suffered any injury other than his subjective fear that his vehicle could malfunction due to

corrosion and cause an accident. Art. 1802 does not provide for the compensation of potential future injuries, only injuries actually suffered.

Therefore, Diaz has failed to establish a viable cause of action under any of the cited laws and his complaint against HMC must be dismissed.

C. *HATCI's Motion to Dismiss*

In diversity cases, *in personam* jurisdiction over a non-resident defendant is determined according to the long-arm statute of the forum in which the federal district court sits. *Pizarro v. Hoteles Concorde Int'l, 907 F.2d 1256, 1258 (1st Cir. 1990).* The exercise of specific *in personam* jurisdiction pursuant to the state long-arm statute must fall within constitutional bounds. *See Pritzker v. Yari, 42 F.3d 53, 60 (1st Cir. 1994); Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201, 207 n. 9 (1st Cir. 1994).* Accordingly, there are two requirements for the proper exercise of specific in personam jurisdiction: (1) that the forum state have a long-arm statute that grants jurisdiction over defendant and (2) that the exercise of jurisdiction under that state statute does not exceed constitutional limits. *Pritzker, 42 F.3d at 60.*

Puerto Rico's long-arm statute is contained in Rule 4.7 of the Puerto Rico Rules of Civil Procedure. Rule 4.7 provides in part:

> (a) Whenever the person to be served is not domiciled in Puerto Rico, the General Court of Justice shall take jurisdiction over said person if the action or claim arises because said person:
>
> > (1) Transacted business in Puerto Rico personally or through an agent; or
> >
> > (2) participated in tortious acts within Puerto Rico personally or through his agent;

> (3) was involved in an automobile accident while driving a motor vehicle in Puerto Rico personally or through his agent; or
> (4) was involved in an accident in Puerto Rico while operating, personally or through his agent, a freight or passenger transportation business in Puerto Rico, between Puerto Rico and the United States or between Puerto Rico and a foreign country, or if, in the operation of said business, an accident occurs outside Puerto Rico and the contract had been executed in Puerto Rico; or
> (5) owns, uses or possesses, personally or through his agent, real property in Puerto Rico.

P.R. Laws Ann. 32, App. III, Rule 4.7(a). It has been interpreted to extend personal jurisdiction to "the full extent of constitutional authority." *Pritzker, 42 F.3d at 60; see also Dalmau Rodriguez v. Hughes Aircraft Co., 781 F.2d 9, 12 (1st Cir. 1996)(citing A.H.Thomas Co. v. Superior Court, 98 P.R.R. 864, 870 n. 5, 98 P.R. Dec. 883 (1970))*. The exercise of *in personam* jurisdiction by courts in Puerto Rico is therefore "limited only by the due process analysis of *International Shoe [v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945)]* and succeeding cases." *Commonwealth of Puerto Rico v. SS Zoe Colocotroni, 628 F.2d 652, 668 (1st Cir. 1980)*. Accordingly, this Court need only determine whether the exercise of jurisdiction over the defendants in the instant case falls within constitutional bounds.

Due process requires that minimum contacts exist between the non-resident defendant and the forum, in

this case Puerto Rico, where the claim was filed. *See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 289, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)*; *International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)*. The minimum contacts must be such that "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe, 326 U.S. at 316*. In other words, Due Process "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Volkswagen, 444 U.S. at 297*.

The First Circuit has developed a three-pronged analysis to sharpen the inquiry into minimum contacts. According to this test, a court may exercise specific personal jurisdiction if the following requirements are met:

> First, the claim underlying the litigation must directly arise out of, or relate to, the defendant's forum-state activities. Second, the defendant's in-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's involuntary presence before the state's court foreseeable. Third, the exercise of jurisdiction must, in light of the Gestalt factors, be reasonable.

Pritzker, 42 F.3d at 60-61.

In this case, Diaz argues that HATCI complies with the requirements of Puerto Rico's long-arm statute because (1) its act of omitting Puerto Rico from the

1998 and 2003 recalls is an act or transaction consummated within this forum because it affected nearly 32,000 class vehicles; (2) its omission gave rise to the cause of action because plaintiff and the class he purports to represent are exposed to substantial and life-threatening injury; and (3) that its omission is substantial enough so as not to offend the due process requirements of fair play and substantial justice. Diaz's claims against HATCI, however, must be dismissed because the Court finds that HATCI has neither conducted a business transaction in Puerto Rico nor committed a tortious act within Puerto Rico.

First, as discussed above, Diaz has suffered no injury. Thus, if Diaz cannot establish that he suffered an injury, it clearly follows that HATCI did not commit a tortious act against him within Puerto Rico.

And second, Diaz has failed to establish that HATCI transacted any business within Puerto Rico. "For such 'minimum contacts' to be sufficient for the exertion of personal jurisdiction, they must be the result of a purposeful act by defendant." *Santini Rivera v. Santon, 118 F.Supp.2d 159, 163 (D.P.R. 2000).* "It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)(citing International Shoe, 326 U.S. at 319).*

HATCI is a subsidiary of HMC which purpose seems to be the design" and development of HMC's vehicles and that takes no part in the actual selling of the vehicles. Actually, it seems HATCI does not conduct any business with entities other than its parent company. [1] It is HMC, through its dealers, who actually

transacts any business in Puerto Rico by importing and selling its vehicles here. So while there's no question that HMC does transact business in Puerto Rico, Diaz cannot show that HATCI has in any way purposely entered the Puerto Rico market. Thus, no basis exists for the Court to exercise its jurisdiction over HATCI and Diaz's claims against it must be dismissed. [2]

1 *See* http://www.hatci.com.

2 It bears noting that even if the Court had *in personam* jurisdiction over HATCI, it would still be inclined to dismiss Diaz's claims because, as discussed above, he has failed to establish a cause of action under any of the above-cited laws.

CONCLUSION

For the foregoing reasons, the Court **GRANTS** HMC's and HATCI's motions to dismiss. Diaz's claims are hereby dismissed. Judgment shall enter accordingly.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 19th day of May 2006.

s/ JAY A. GARCIA GREGORY

United States District Judge

No. 06-2026

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RAFAEL DIAZ-RAMOS,
Plaintiff, Appellant,

v.

HYUNDAI MOTOR COMPANY and HYUNDAI AMERICAN TECHNICAL CENTER, INC.
Defendants, Appellees.

Entered: September 24, 2007

Before: Boudin, Chief Judge, Torruella, Circuit Judge, Selya, Senior Circuit Judge, Lynch, Lipez, Howard, Circuit Judges, and DiClerico*, District Judge.

ORDER OF COURT

The petition for rehearing having been dienied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges ofthis court and a majority of the judges not having voted tha the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

Footnote

*Of the District of New Hampshire, sitting by designation.

Guzmán et al. v. Tres Monjitas Inc. Dairy Farm, et al.
Puerto Rico Supreme Court Opinion of December 14, 2006

2006 TSPR 187, 169 DPR ___ (Fiol Matta)
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II

Through their allegations the petitioners propose that the class action for consumers of goods and services recognized by the Law 118 is different than the general class action of Rule 20. The present lawsuit requires, therefore, to define the relationship between both provisions, in order to determine if, in effect, the present cause of action can be certified as a class action. The underlying controversy is to determine the standard to be followed by the courts in certifying a class action suit when the same is filed by consumers of goods and services.

III
***

As is common knowledge, in Puerto Rico we have been progressively adopting the American civil procedure system.[3] Along that course, new Rules of the Code of Civil Procedure were enacted in 1943, these were basically a translation of the Federal Rules of Civil Procedure. Rafael Hernández Colón, Manual of Civil Procedure Law 4-12 (1981). At that time we introduced the figure of class action as drafted on Rule 23 of the Federal Civil Procedure, in its 1938 version.
***

From the above stems the fact that class actions in Puerto Rico suffered the same ill fate of class actions

in the United States before the Federal Rules of Procedure were amended in 1966. As pointed out before, in the United States this interpretation had caused serious problems for filing group claims which did not represent joint or several rights, flaws that were corrected in the Federal Rules by the amendment of 1966.

Within this context and in response to the need of making class actions a useful mechanism for consumers, our Legislature passed the Law No. 118 of June 25, 1971, 32 LPRA 334, creating the class action of the consumer of goods and services. Evidently, when this law was passed an exception to Rule 20.1 was established, providing that a technically "spurious" class could obtain a judgment whose effects would be extended to all class members even if they were not present in court. Specifically, the Law 118 recognized the right of the consumers of goods and services and of the Commonwealth of Puerto Rico, as *parens patriae*, to "file a class suit on behalf of said consumers by reason of damages."

This new legislation incorporated, in an abbreviated manner, several dispositions of the Federal Rule 23. In first place, it requires that the court determine, as soon as possible, if the action may continue as a class action, when there is a common question of fact and law among the allegedly affected consumers. This requirement is similar to the one that has been named "commonality".[5] Likewise, the Law 118 requires that the class action be deemed superior to other available resources for the fair adjudication of the controversy. Lastly, the Law 118 adopts the norms of Federal Rule 23 regarding notice to class members.

The objective of overcoming the flaws of the Rule 20 by then in effect is clearly exposed in the

extremely inclusive language used by the legislator when defining the class as a group of people who have among them a "common question of fact or law". 32 LPRA §3344. This intent arises also from the Joint Report of the Senate on S.B. 825 of April 15, 1971, which expressly points out that "the purpose of this measure is to *make an addition* to Rule 20 of the Civil Procedure in order to allow consumers of goods and services to file a class action suit" (emphasis ours).

The statement of motives of the Law 118 highlight the legislator's concern regarding the limitation of the legal tools available to Puerto Rican consumers, pointing out that:

> Unfortunately the remedies available to consumers to enforce their rights are still inadequate and the protection offered the consumer by the Consumers Service Administration...[6] is not sufficient... For this reason, a suit filed directly by the consumer is warranted in such cases. [OFFICIAL TRANSLATION]

In addition, the Law 118 recognized the inherent difficulty of claiming small sums against the big businesses. As so is recorded also in its statement of motives by stating that:

> Usually claims of the consumers involve such small amounts of money that they do not justify an individual suit; it is more economical and fair that claims essentially identical be filed in a single class suit on behalf of all consumers who have been cheated and deceived... This type of action compensates the inability of the individual

> consumer to litigate small individual losses by permitting that one or more representatives of a group of consumers with similar damages may bring a suit on behalf of a class...The latter are forced to consider not only the direct economic loss of the class suit but also the publicity and public reaction with the entailing loss of time, name or prestige. In the interest of discouraging the improper and deceitful conduct of the suppliers of goods and services to consumers, the Legislature of Puerto Rico considers it of imperative necessity to establish the consumer class suit. [OFFICIAL TRANSLATION]

This means that the Law 118 intended, on the one hand, to extend the scope of Rule 20 overcoming the limitations imposed on the so called spurious class, and on the other, to authorize the consumers to go directly to Court to vindicate their rights without having to be assisted by a governmental agency. In this sense, its objective is to eliminate all legal obstacles that might make it difficult for the consumers to go to Court.

In summary, the class action established by the Consumer of Goods and Services Class Action Act had the purpose of *overcoming* the limitations of the old Rule 20 of civil procedure, allowing consumers as well as the State to go to Court and safeguard the rights of consumers. It constitutes, according to its statement of motives "an addition" to the general provisions of Rule 20. Therefore it did not create a class action necessarily different but, in recognizing the public interest to protect the consumers of goods and services, it extended the scope of the class action to them. This, in addition to the fact that the Law 118 does not establish

specific criteria to define what constitutes a class, means that at the time of certifying a class the courts must examine if they comply, not only with the general definition of the Law 118, but also with the specific requirements of Rule 20.

We must highlight that the Rule 20 now in force is the 1979 amended version, after the promulgation of the Law 118. That year the Rule 20 was revised entirely to make it similar to the Federal Civil Procedure Rule 23 adopted in 1966 and allow, therefore, filing typically spurious class actions. Obviously, the intent was to stretch the definition as well as the scope of class actions so that they would be more accessible to other groups that, just as consumers of goods and services, would not have any other means and, as a practical matter, an opportunity to claim their rights in court. [7]

It is necessary to recognize that when amending Rule 20 the Law 118 lost part of its initial relevance. Nonetheless, this does not mean that it is dead letter. When the new Rule 20 was passed our Legislature did not abolish the Consumer Class Action Act. It survived as a specific tool that grants the consumers a broad and effective instrument to protect their rights. Even if it is a class action essentially similar to Rule 20, the Consumer Class Action Act allows the concession of additional remedies, among them the injunction and it recognizes the right to the consumers to file an action under the Antitrust Act of the Commonwealth of Puerto Rico, 10 LPRA § 257 et. seq.

As pointed out earlier, the Law 118 authorizes to the consumers of goods and services to go to court to vindicate their rights, allowing them to avoid the obstacles that are occasionally presented by the bureaucracy of the agencies that are called upon to

defend them. Law 118 constitutes, therefore, a mandate for the courts to open our doors to the consumers injured by the unlawful practices of the providers of goods and services.

This mandate was reiterated as recently as 2002 when the Law No. 269, which was passed on November 16 of that same year, amended the Law 118 to clarify the primary jurisdiction of the Court of First Instance in this type of litigation. There the legislator stressed in the statement of motives that:

> The protection of consumers of goods and services is imbued by the greatest public interest... Through this Act, this Legislature solidifies the cause of action provided by Act No. 118 by clarifying that the Court of First Instance has exclusive primary jurisdiction, this being a special cause of action. [OFFICIAL TRANSLATION]

In summary, in evaluating the discretion of the Court of First Instance when certifying a class, we cannot leave behind our Legislature's mandate to pave the way to court for consumers.

Of the above it is necessary to underscore the following points. In first place, the Law 118 did not create a different class action form from the one established by Rule 20, but it extended the remedies available for the consumers of goods and services. In terms of the requirements applicable to certify a class of consumers of goods and services we should emphasize the requirements of "predominance and superiority", and "commonality" which, although present in Rule 20, are the only ones expressly provided for in the Law 118. This means that when

filing class actions under this Law, we should focus first on these two requirements to determine if an alleged class deserves the remedies established therein. Once the requirements of "predominance and superiority", and "commonality" are satisfied it is necessary to examine if the other supplemental requirements of Rule 20 are met, in other words, numerosity, typicality and adequate representation. Nevertheless, when applying these requirements we must interpret them within the spirit of liberality and inclusion that inspired the Law 118.

III

To clarify the abovementioned let us examine the particular facts of this case interpreting the criteria of "predominance and superiority" provided by the Law 118 and the other criteria of the Rule 20 of Civil Procedure, with the liberality required by the Law 118. There is no doubt that it is within a broad framework of discretion of the Court of First Instance to determine if a lawsuit qualifies as a class action. This commonly means that the reviewing courts should not intervene in that decision, unless it is proved that the instance forum has abused its discretion. Meléndez Vega v. Caribbean Intl. News, 151 D.P.R. 649, 664 (2000); Lluch v. Espa a Service Sta., 117 D.P.R. 729, 745 (1986); Valencia, Ex parte, 116 D.P.R. 909, 913 (1986); Ortiz Rivera v .Agostini, 92 D.P.R. 187, 193 (1965). José Cuevas Segarra, Law Treaty for Civil Procedure, 396. Nevertheless, as we pointed out earlier, in the particular case of the class action of the consumers of goods and services, said discretion is *limited* by the public interest in favor of the consumers as stated by the Law 118. Not acting in this way would attempt against a clear and reiterated legislative intention.

***

CERTIFICATE OF TRANSLATOR

I, Brenda Bibiloni, US Certified Translator/Interpreter, certify that the following tanslations are a true and exact translation of the documents provided to me: *** (3) Guzman et al. v. Tres Monjitas Inc. Dairy Farm, et al.

I also certify that in no form or manner am I related to the parties nor am I interested in the results of this matter. I certify today, January 19, 2007.

Footnotes

[3]Before the American invasion in 1898, in Puerto Rico applied the Code of Civil Procedure of 1886 which remained in force until August 16, 1899, when the Military Government issued the Order #118 which reorganized the judiciary branch and provided norms regarding judicial, civil and criminal procedures. This Order established certain procedural rules and recognized the force and effect of many others of the prior Code of Civil Procedure that remained partially in effect. On March 10, 1904 the Code of Civil Procedure of 1904 was approved, it was prepared by the so-called "Commission of Codes", in charge of harmonizing our legal system with the new political regime. Rafael Hernández Colón, Manual of Civil Procedure Law 4-12 (1981).

[5]This is the same requirement of Rule 20.1 (2) of the Puerto Rico Civil Procedure.

[6]Predecessor of the Department of Consumer Affairs.

[7][Footnote omitted (about real, hybrid and spurious classes)]

P.R. Laws Ann. Title 32, §§ 3341-3344 — Class Suit for Consumers of Goods and Services.

§ 3341. Suit for damages.

There is recognized the right to consumers of goods and services and/or to the Commonwealth of Puerto Rico, through their agencies, dependencies and instrumentalities in their capacity of "parens patriae" to file a class suit on behalf of said consumers by reason of damages as well as injunction suits under Rule 57 of the Rules of Civil Procedure of 1958, for the General Court of Justice, as amended.
(June 25, 1971, No. 118, p. 362, § 1).

§ 3342. Suit against monopolies.

There is recognized the right to merchants, to consumers of goods and services and to the Commonwealth of Puerto Rico to file a class suit on behalf of said merchants or consumers based on the Antitrust Act of the Commonwealth, §§ 257- 274 of Title 10.
(June 25, 1971, No. 118, p. 362, § 2).

§ 3343. Jurisdiction of Court of First Instance.

The Court of First Instance shall have exclusive primary jurisdiction on class suits filed pursuant to this chapter. Therefore, the court is hereby vested with authority to prevent, avoid, deter and punish any action to the prejudice of the consumers and/or independent merchants [irrespective] of the amount involved, and during the proceeding before final judgment is rendered, the court may enter such restrictive and

prohibitive orders as it may deem fair and equitable pursuant to the act giving rise to the action.

In its order or judgment, the Court of First Instance shall impose an amount equal to the damages determined as compensation for damages, plus a reasonable amount not less than twenty-five percent (25%) for attorney's fees, plus legal interest from the moment the damage is caused and costs of the proceedings. Any judicial action or suit filed individually may be settled through the intervention of the Consumers Service Administration, which shall have thirty (30) days after receiving notice of the settlement by the court to state its position on the matter.
(June 25, 1971, No. 118, p. 362, § 3; Nov. 16, 2002, No. 269, § 1).

P.R. Laws Ann. Title 10, §§ 257-276 — Monopolies and Restraint of Trade.
§ 259. Fair competition.

(a) Unfair methods of competition, and unfair or deceptive acts or practices in trade or commerce are hereby declared unlawful.
(June 25, 1964, No. 77, p. 235, § 3; May 30, 1970, No. 67, p. 78; June 23, 1978, No. 72, p. 242, eff. June 23, 1978).

§ 268. Actions by persons suffering damages.

(a) Any person who shall be injured in his business or property by any other person, by reason of acts or intended acts, forbidden or declared to be unlawful by the provisions of this chapter, except §§ 259 and 261 of this title, may sue therefor in the Court of First

Instance and shall recover threefold the damages by him sustained, plus costs, including a reasonable amount for attorney's fees.
(June 25, 1964, No. 77, p. 235, § 12).

P.R. Laws Ann. Title 23, §§ 1001-1017 — Consumers Service Administration.

§ 1005. Powers.

(g) To resolve and adjudge the complaints presented by the consumers of goods and services acquired or received from the private sector of the economy entailing any unfair or deceitful act or practice including, but without it being limited, to the unfulfillment of an offer, warranty or service, or the publication of false or deceitful advertisements.
(June 27, 1968, No. 148, p. 438, § 5; June 30, 1972, No. 31, p. 445).

§ 1016. Costs and attorney's fees.

(a) The Department of Consumer Affairs and the Department of Justice may recover costs and attorney fees in all actions that are filed in our courts and in the federal courts for the protection of consumers.

(b) The costs and attorney's fees recovered under subsection (a) of this section shall be covered into the Treasury of Puerto Rico, in a Special Fund to be administered by the Secretary of the Treasury of Puerto Rico, but which shall be devoted to defray, in part, the expenses incurred by these agencies in initiating future actions for the protection of the consumers.

(Mar. 20, 1972, No. 10, p. 23, §§ 1, 2; Sept. 17, 2004, No. 379, § 2).

§ 1017. Amounts recovered in judgments; special fund.

The amounts recovered by the plaintiffs on behalf of consumers and/or merchants unnamed or undetermined in class suits under the laws of the Commonwealth and/or the United States of America shall be deposited in a Trust Fund to be used according to an order issued by the sentencing court, which shall see that said amounts be used in favor or in benefit of the consumers' or merchants' class who suffered the damage.

The court shall appoint an administrator for such Fund and shall fix his fees. If the administrator happens to be a government official, he shall receive no compensation whatsoever.

During the year following the filing of copy of the judgment, any member of the class favored by the latter may claim his rights pursuant to the proceedings established by the court.

After one year, the amounts recovered shall be deposited in a Trust Fund created by § 1016(b) of this title and shall be used for the prosecution of actions for protection of the consumers and/or merchants.

The court shall order the administrator to notify the members of the class through the publication of edicts in two (2) newspapers of general circulation and in a fairly visible way, once (1) a week, during the four (4) weeks immediately following the judgment and the four (4) weeks immediately preceding the end of the one (1) year prescribed period settled in this section. The court may provide, in addition to the method herein indicated, any other it deems proper.
(June 7, 1973, No. 110, p. 455).

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(2)

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MAR 28 2008
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SUPREME COURT, U.S.

No. 07-988

In the Supreme Court of the United States

RAFAEL DIAZ-RAMOS, PETITIONER

v.

HYUNDAI MOTOR COMPANY AND HYUNDAI AMERICAN TECHNICAL CENTER, INC., RESPONDENTS

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The First Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the First Circuit misapplied Puerto Rico law in concluding that Puerto Rico's consumer class-action law does not provide an independent private cause of action for class suits alleging deceptive trade practices, where an individual cause of action alleging such practices is expressly barred by statute and the class-action law does not purport to modify it.

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INTRODUCTION

The petition, for all its rhetoric about the *Erie* doctrine and judicial "nullification" of state law, seeks nothing more than a third attempt to persuade a federal court to adopt the petitioner's interpretation of a Puerto Rico law that could be definitively construed at any time by the Puerto Rico courts. Petitioner's attempt to re-litigate a single issue of state consumer-protection law does not merit the use of the Court's certiorari jurisdiction.

In any event, as the First Circuit held, the interpretation petitioner seeks is implausible. Petitioner argues that Puerto Rico's Consumer Class Action Act, which is similar to Fed. R. Civ. P. 23, of its *own* force creates a private right of action for deceptive trade practices, even though the Puerto Rico law that makes such practices unlawful—the Puerto Rico Antitrust Act—expressly excludes "deceptive practices in trade or commerce" from the private cause of action it creates for other antitrust violations. As the First Circuit recognized, it would be anomalous, at best, for a federal court to hold, without any clear statutory warrant, that a local *procedural* statute creates a private right of action that is expressly denied by the underlying substantive statute.

There is, therefore, no need for this Court to second-guess the First Circuit's eminently reasonable judgment, which, again, the Puerto Rico Supreme Court can easily correct in another case if it believes the First Circuit got it wrong. Indeed, having *elected* to file his suit in federal court rather than the Puerto Rico courts, petitioner is hardly in a position to complain about the federal courts' reluctance to "push the envelope" of Puerto Rico law.

STATEMENT OF THE CASE

Petitioner's lawsuit is an attempt to impose state law liability on automobile recalls conducted in compliance with federal law. In 1998 and 2002, Respondent Hyundai Motor Company ("Hyundai") launched recall campaigns for the 1995-1997 Hyundai Accent to remedy potential suspension problems that could result from road-salt-related corrosion. Because of the uniquely road-salt-related nature of the problem, the recalls were limited to states in the northern "salt belt" region designated by the National Highway Traffic Safety Administration ("NHTSA"). Pet. App. 11a. It is undisputed that both recalls were conducted in compliance with applicable NHTSA regulations.

1. Petitioner Rafael Diaz-Ramos ("petitioner" or "Diaz") is a citizen of Puerto Rico who claims to own a 1995 Hyundai Accent of the type implicated by the recalls, but whose car was not included in the recalls because it was never located in the salt-belt region. Diaz's lawsuit challenges what he claims is the "unfair trade practice of excluding the consumers in Puerto Rico from 'recalls' intended to remedy corrosion-related defects in Hyundai's vehicles." Amended Complaint ¶ 2 (J.A. at 1).[1]

The core of his complaint is that the "exclusion" of Puerto Rico from the regional "salt-belt" recall—a practice authorized by federal law—was somehow wrongful: he variously characterizes the regional recall as "unfair," "exclusionary," "scientifically un-

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[1] The District Court dismissed petitioner's claims against Respondent Hyundai American Technical Center for lack of jurisdiction, and Diaz did not appeal that portion of the court's order. Hyundai Motor Company is the only remaining respondent.

sound," "unjustified," and "unreasonable." Amended Complaint ¶¶ 2, 3, 57, 58, 66 (J.A. at 1, 10, 12). The class of consumers he seeks to represent includes other citizens of Puerto Rico who own Hyundai cars (none of which were "salt-belt" cars) and whose safety he alleges "is being jeopardized by Hyundai for not including Puerto Rico in the safety recalls that have been made in other so-called salt-belt states." Amended Complaint ¶ 81 (J.A. at 15).

2. Rather than file in the local Puerto Rico courts, Diaz filed an amended complaint in federal district court "on behalf of himself and all other persons and entities similarly situated in Puerto Rico, members of a consumer plaintiff class" pursuant to Puerto Rico's consumer class action law, 32 P.R. Laws Ann. § 3341-44, alleging violation of Puerto Rico's deceptive trade practices law, 10 P.R. Laws. Ann. § 259. Amended Complaint ¶ 88 (J.A. at 17). Hyundai filed a motion to dismiss all of Diaz's claims, including his claims based on Puerto Rico's Antitrust Act, Motor Vehicle Act, Consumer Class Action Act, and common-law tort, for failure to state a claim under Federal Rule 12(b)(6). The District Court entered judgment dismissing all of Diaz's claims against Hyundai for failure to state a claim. Pet. App. 11a-14a.

Diaz appealed, alleging only that the District Court erred in dismissing his claims under the Antitrust Act and Consumer Class Action Act. Following full briefing and oral argument, the First Circuit affirmed the dismissal of Diaz's claims. Interpreting Puerto Rico law, it held that "[i]n light of the explicit statutory language, longstanding precedent regarding class actions, legislative history, and established principles of statutory interpretation," no "private right of action exists" to support Diaz's claims. Pet.

App. 1a-2a. Diaz timely filed a petition for rehearing, which was denied on September 24, 2007, and this petition followed.

REASONS FOR DENYING THE PETITION

The petition asks this Court to exercise its discretionary certiorari jurisdiction to review a relatively minor question of Puerto Rico class-action law, based upon spurious allegations of *Erie* violations and "nullification" of state law. But petitioner's characterization of the Puerto Rico laws at issue is unsupported by the statutes themselves or any other authority. At its heart, this is an ordinary merits appeal grasping for an extraordinary writ—and it is wrong on the merits. The petition satisfies none of this Court's criteria for certiorari, and it should be denied.

I. Petitioner's Claims of *Erie* Error And Federal "Nullification" of State Law Are Spurious.

Diaz devotes the majority of his petition to arguing the merits of the First Circuit's decision. But his arguments that the First Circuit violated *Erie* and "nullified" state law are fanciful, and present no issues warranting this Court's review.

A. Diaz's *Erie* Argument Is Misguided Because The First Circuit's Decision Was Based Squarely On Puerto Rico Law.

Diaz's claim of an *Erie* violation is based upon his assertion that the First Circuit improperly relied on *federal* decisional law to conclude that the Puerto Rico CCAA "is merely 'procedural'" and does not create a private cause of action. Pet. 19-20; *see Erie Ry. Co. v. Tompkins*, 304 U.S. 64 (1938) (stating that "[e]xcept in matters governed by the Federal Consti-

tution or by acts of Congress, the law to be applied in any case is the law of the state"). But *Erie* is wholly irrelevant here, because the court of appeals quite obviously based its conclusion on its analysis of Puerto Rico law.

In its decision, the First Circuit expressly considered "the specified sections . . . of the Antitrust Act," and the "legislative history of the CCAA," as well as "established principles of statutory construction." Pet. App. 6a-7a. Its review of authorities construing Fed. R. Civ. P. 23 and its state equivalents—none of which has ever been construed to create substantive rights—merely confirmed by analogy what the court's analysis of state law showed: that the CCAA is a procedural mechanism facilitating class actions to vindicate existing consumer rights, and not itself a source of additional substantive rights. *See* Pet. App. 5a-6a.

Because the First Circuit properly based its conclusion on Puerto Rico law, *Erie* and its progeny are irrelevant. The petition appears to invoke them solely to cloak its merits arguments about the correct interpretation of Puerto Rico law in the vestments of constitutional error. But there is no *Erie* issue here that is worthy of certiorari review; indeed, there is no *Erie* issue here at all.

B. A Federal Court's Interpretation Of State Law Does Not Constitute "Nullification" Of That Law, Especially Where State Courts Remain Free To Supersede The Federal Interpretation.

Acknowledging that this Court "does not normally grant petitions for certiorari solely to review what purports to be an application of state law," Diaz strains to conform his petition to the only contrary

example he can find, *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which the Court summarily reversed a Tenth Circuit decision that effected what the Court termed a "blatant nullification of state law." *Id.* at 144-45 (1996). See Pet. 23-24. But the extraordinary "nullification" of state law at issue in *Leavitt* bore no resemblance to the commonplace statutory interpretation at issue here.

In *Leavitt*, the Tenth Circuit invalidated as unconstitutional a statutory provision regulating abortions *after* 20 weeks, and then struck down another provision of the same statute regulating abortions *up to* 20 weeks "on the ground that the [second] provision was not severable from" the first, and that "the Utah Legislature would not have wanted to regulate the later-term abortions unless it could regulate the earlier-term abortions as well." *Id.* at 138. The Tenth Circuit's conclusion that the two provisions were not severable was contradicted by an express statutory severability clause, which provided that "[t]he legislature hereby declares that it would have passed this part [of the statute] . . . irrespective of the fact that any one or more provision . . . be declared unconstitutional." Utah Code Ann. § 76-7-317 (1995) (*quoted in* Leavitt, 518 U.S. at 140).

Leavitt is readily distinguished from the present case on (at least) two grounds. First, the Tenth Circuit's decision in *Leavitt* invalidated the Utah statute on *federal* constitutional grounds, such that the Utah state courts were powerless to correct the federal court's error. There was no possible remedy for the Tenth Circuit's "total invalidation of a state-wide law" other than reversal by this Court. *Leavitt*, 518 U.S. at 144. Here, by contrast, the First Circuit's decision is not even binding on the Puerto Rico Supreme

Court, which is the ultimate arbiter of the meaning of Puerto Rico law. *Eisenstadt v. Baird*, 405 U.S. 438 (1972). A non-binding interpretation of a state statute by a federal court cannot reasonably be characterized as a "nullification" of state law.

Second, in *Leavitt* the Tenth Circuit's decision openly flouted the plain intention of the Utah legislature, as expressed in the very statute at issue. 518 U.S. at 144-45. Nothing remotely similar occurred here. As we demonstrate in part II below, it is *Diaz's* proposed interpretation of state law that would "blatantly nullify" the provision of Puerto Rico's Antitrust Act that expressly bars Diaz's lawsuit.

Unlike *Leavitt*, this action presents none of the indicia of an "extraordinary case," and the petition is thus a routine assertion of error by a disappointed litigant. As such, it would not warrant this Court's review even if petitioner's substantive arguments had merit.

II. The Court of Appeals' Decision Was Correct.

In any event, petitioner is wrong on the merits. The First Circuit was correct to conclude that the CCAA does not create a private right of action against allegedly deceptive trade practices, and Diaz has identified no grounds for reconsidering that conclusion.

A. Puerto Rico's Antitrust Act Expressly Denies A Private Right Of Action Against Deceptive Trade Practices, And The CCAA Does Not Purport To Create One.

First, Diaz's lawsuit is grounded on a statute, the Puerto Rico Antitrust Act, that on its face denies a

private right of action for the suit Diaz wishes to bring. As the petition concedes, Diaz "premised his cause of action on ... section 259" of the Act, which makes unlawful "[u]nfair methods of competition, and unfair or deceptive acts or practices in trade or commerce." Pet. 3; Pet. App. 30a. But § 268 of the Antitrust Act, which creates the private right of action for other violations of the Act, expressly *denies* a private right of action for violations of § 259. Pet. App. 30a-31a.

Diaz does not dispute that a § 259 action against Hyundai brought in his *individual* capacity would be barred by § 268. Instead, he argues that the CCAA permits him to do as a class representative what he concedes he cannot do as an individual: obtain a civil remedy for alleged violations of § 259. In effect, he claims that the CCAA creates a cause of action for violations of the Antitrust Act that exists independently of the cause of action created by the Act itself. But neither the text of the CCAA, its legislative history nor judicial precedent supports Diaz' extraordinary argument.

Diaz's CCAA argument is based on § 3342 of that Act, which "recognize[s]" the right of "consumers of goods and services . . . to file a class suit on behalf of said consumers . . . based on the Antitrust Act of the Commonwealth, §§ 257-274." Ibid. Diaz asserts that, because § 3342 identifies a "right" to file a class action based on the Antitrust Act, it must permit class actions based on *any part* of the Antitrust Act—including those provisions, like § 259, for which no individual right of action exists.

As the First Circuit held, however, § 3342's broad cross-reference to the entire Antitrust Act is insuffi-

cient to demonstrate "that the legislature intended to override section 268's more specific statement that section 259 does not support a private right of action." Pet. App. 6a. As a matter of statutory construction, it is a "commonplace . . . that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992). Here, § 268 of the Antitrust Act specifically denies a private right of action for alleged violations of § 259(a). By contrast, neither § 3342 nor any other part of the CCAA makes any reference to § 259(a), to deceptive trade practices, or to any specific part of the Antitrust Act at all—instead merely referring generically to the entire statute. Such a general reference is not sufficient to supersede the specific denial of the cause of action in the Antitrust Act itself. *See, e.g., Preiser* v. *Rodriguez*, 411 U.S. 475, 490 (1973) (holding that a specific statute overrides an otherwise applicable general statute).

Moreover, contrary to Diaz's suggestion that "harmonizing" § 3342 and § 259(a) requires adoption of his interpretation, the opposite is true: the easiest way to "harmonize" the two statutes is to give effect to all their provisions, including § 259(a)'s denial of a private right of action. So interpreted, the CCAA *would* permit class actions for violations of the Antitrust Act for which the Act already affords a private right of action—§§ 258, 260, 262, 263, and 264. *See* 10 P.R. Laws Ann. § 268 (providing a right of action for violations of all provisions of the Antitrust Act except §§ 259 and 261). But it would deny such claims for violations of § 259(a)'s prohibition on deceptive practices.

Accordingly, the First Circuit's interpretation, by aligning the availability of class actions with the

availability of individual actions, eliminates any possible tension between the statutes and gives both provisions their natural reading.

B. The Puerto Rico Supreme Court's Decision in *Guzman* Does Not Even Purport To Address The Issue Presented Here.

The petition also relies heavily on the argument that the Puerto Rico Supreme Court's decision in *Guzman* (*Guzman Matias* v. *Vaqueria Tres Monjitas, Inc.*, 2006 TSPR 187 (P.R. Dec 14, 2006)) is an "intervening" and "conflicting" state-law precedent. Pet. 14-15, 25. But it is neither. An "intervening" case is one that becomes final after judgment has been entered below. *See Shoketsu Kinzoku Kogyo Kabushiki Co. v. Festo Corp.*, 520 U.S. 1111 (1997) (granting certiorari, vacating judgment, and remanding case in light of intervening decision). By contrast, *Guzman* was publicly available long before briefing and argument in the First Circuit were complete and was in fact argued to, and implicitly rejected by, the Court of Appeals. *See* Rep. Br. for Appellant at 14-17 (discussing *Guzman*). Thus, even if Diaz's interpretation of *Guzman* were correct, *Guzman* would not be an "intervening case" warranting a "grant, vacate, and remand" order.

In any event, Diaz's understanding of *Guzman* is plainly incorrect. *Guzman* nowhere even mentions § 259(a) or § 268 or their relationship to the CCAA.[2] The only question before the Puerto Rico Supreme

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[2] The excerpts of *Guzman* provided in the Petitioner's Appendix omit significant portions of the decision that clarify the context of the court's discussion of the CCAA. We have provided a complete translation of the decision at Respondent's Appendix A.

Court in that case was whether a purported class action satisfied the "numerosity" requirement of Rule 20.1 of the Puerto Rico Rules of Civil Procedure, which provides the requirements for certification of a class. Reading Rule 20.1 in light of the CCAA, the court concluded that the numerosity requirement should not be read to require joinder of additional plaintiffs at the certification stage. Resp. App. 20a-22a. All of the court's discussion of the CCAA and its purposes occurred in this very limited, strictly procedural context.

By contrast, the principal issue here—whether the CCAA creates a private right of action despite the denial of such a right in the Antitrust Act—is wholly absent from *Guzman*. In fact, Diaz has identified no decision by *any* court that supports his strained interpretation of Puerto Rico law. This Court should not be the first.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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March 2008

APPENDIX

APPENDIX A

MicroJuris Certified Translation MC-2007-270

Volume 169

2006 TSPR 187 -- **Guzmán Matías, Juarbe, Tres Monjitas Dairy Farm**

Information of the Document

Parties	Jose Guzman Matías and Rafael Juarbe De Jesus, on their own behalf and on behalf of a class comprised by all of the persons who are in the same situation, as described in the complaint, Petitioners and Plaintiffs v. **Tres Monjitas** Dairy Farm, Inc., et al., Defendants-Respondents
Date:	December 14, 2006
Citation:	2006 TSPR187, 169 DPR.
Court number:	CC-2004-811
Judge	Fiol Matta
Origin: IV	San Juan Judicial Region-Panel
Attorneys:	Attorney for the Petitioner: Mr. Domingo Donate Perez; Attorneys for the Respondent Mr. Samuel Torres Cortés, Mr. Juan M. Martinez Nárvaez, Mr. Luis G Martinez-Lloréns, Mr. Miguel Simonet Sierra; Office of the General Solicitor: Ms. Lizette Mejias Aviles, Deputy General Solicitor
Subjects:	Damages; Consumer; Civil Procedure

Majority Opinion; Fiol Matta

Page 1

OPINION OF THE COURT DELIVERED BY ASSOCIATE JUSTICE MRS. FIOL MATTA

San Juan, Puerto Rico, on December 14, 2006.

I.

In this case, the petitioners requested review of a judgment of the Court of Appeals, of July 30, 2004, which confirms a resolution of the First Instance Court denying to certify the above captioned case as a class suit. It is up to us to determine whether in light of Act Number 118 of June 25, 1971, which sets forth a class suit of goods and services consumers, and Rule 20 of Civil Procedure in Puerto Rico, this action must be certified as a class suit.

II.

On April 30, 1999, the petitioners presented a complaint for damages against **Tres Monjitas** Dairy Farm, Inc., Suiza Dairy, Corp. Borinquen Dairy, Inc., the Administrative Board of the Fund for the Development of the Milk Industry, Luis Fullana Morales, the Commonwealth of Puerto Rico, and others. The petitioners appeared "in their personal capacity... and on behalf of each and every person who constitutes a member of their class". They alleged; in synthesis, that for several years, prior to December 1998, the practice of adulterating fresh milk adding water and salt was being carried out in Puerto Rico. They argued that the respondents had knowledge or should have had knowledge of such practice. Likewise, they stated that the Commonwealth was negligent in not using adequate methods to detect the practice of milk adulteration. They adduced that they paid large amounts of money for an adulterated product that did

not meet requirements of integrity, salubrity, and hygiene demanded by the laws of the United States and Puerto Rico in order to be able to categorize milk as Grade A. They claimed, on their own behalf and on behalf of the consuming class of adulterated milk, $10,000 for each petitioner, for having paid for the unadulterated milk at a price higher than its fair value, and $10,000 for the mental and moral anguish suffered.

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After several interlocutory proceedings, on September 9, 1999, the petitioners presented a Request for Order to Certify a Class, pursuant to Act Number 118 of June 25, 1971, known as the Goods and Services Consumers Class Suit Act, 32 L.P.R.A. section 3341 - 3344, and Rule 20 of Civil Procedure of Puerto Rico, 32 L.P.R.A. Ap. III, R. 20. On September 14, 1999, the respondents opposed said request.

On July 10, 2002, the parties submitted to the consideration of the First Instance Court a Pre-Trial Conference Report Regarding Class Certification. Therein, the petitioners presented several amendments to their allegations: 1) they requested to reduce the claim for the excess paid for the milk from. ten thousand dollars ($10,000) claimed originally to "no less than two hundred dollars each"; 2) they requested to reduce the claim for physical damages and mental anguish, from ten thousand dollars ($10,000) to "no less than $100.00 each"; 3) it was specified that the definition of the class was that of consumers who had purchased adulterated milk from 1994 through 1998, different from a complaint in which no period whatsoever was stated; and 4) all of the employees of the defendants, the attorneys of the parties, and the

judges of the judicial system of Puerto Rico were excluded from the class.

Thus, on August 6 and 7, 2002, a hearing was held regarding the certification of the class. The First Instance Court requested all parties to present memorandums of law; and afterwards, on August 29, 2003, rendered a resolution and order, notified and filed in the docket on September 11, 2003, wherein it ruled that the petition for certification of class did not meet the *numerosity* requirement and denied it. The Court based itself that approximately 4 years had elapsed since the complaint was filed and there had not been a single person who had requested joining the class suit as a plaintiff. Timely, the petitioners filed Recourse for Certiorari before the Court of Appeals. Such forum agreed with the criteria of the First Instance Court and confirmed the appealed resolution.

Not in agreement with its ruling, the petitioners resort to this Court alleging that the Court of Appeals, as well as the First Instance Court, had erred "when concluding that it was not proper to certify the lawsuit as a class suit because, pursuant to the current state of law, the plaintiffs do not meet the numerosity requirement."

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Specifically, the petitioners state that the appealed Court committed a grave error of law when basing its ruling on that it was unknown "whether other citizens would have requested joinder as a party represented in the class suit". Likewise, they reject the contention of the Court of Appeals as to them meeting the numerosity requirement, the plaintiffs had to: a) present a reasonable estimate of the consumers they represent; b) present evidence regarding the potential

number of individuals who ingested the adulterated milk; c) qualify the number of milk consumers that there are in Puerto Rico and how many of them consumed adulterated milk from 1994 through 1998 and d) show the consumption habits of fresh milk of the members of the class.

Likewise, they stated that their complaint was presented pursuant to Act Number 118 of June 25, 1971, which, according to them, sets forth a more flexible standard to define a class. Pursuant to this perception, Act 118 has the purpose of "surpassing the limitations of Rule 20 of Civil Procedure", therefore it was only required to "determine whether a common matter of fact or law exists, and that the class suit is superior to other methods available". In the alternative, they alleged that they meet the "supplementary" requirements set forth by Rule 20. On the other hand, the respondents state that the consumer class suit must meet the requirements of Rule 20, notwithstanding the more flexible language of Act 118. Hence, they state that the petitioners do not meet any of the requirements of Rule 20, and, in the alternative, state that they do not meet the presuppositions of Act 118 either.

Through their allegations the petitioners propose that the class suit for goods and services consumers acknowledged by Act 118 is different than the general class suit of Rule 20. This lawsuit requires, therefore, to define the relationship between both provisions, in order to determine whether, in fact, this cause of action can be certified as a class action. The underlying controversy is to determine the standard to be followed by the courts in certifying a class suit suit [sic] when it is filed by goods and services consumers. Let us see.

III

The class suit constitutes a special form of representative litigation that allows a person or group of persons to sue on their own behalf and on behalf of other persons who are in a similar situation as this but that are not before the Court. Cuadrado Carrión v. Romero Barceló 120 D.P.R. 434, 445-46 (1988). In general terms, we have stated that this procedure advances three public interests, to wit, it promotes *judicial economy* by allowing the courts to adjudicate once and for all, all matters common to several litigations, thus avoiding multiple claims; allows us to do *justice* to the persons who would otherwise not obtain it, especially when the individual claims that are in controversy are not considerable; and therefore, those injured do not feel motivated to litigate; and to protect the parties from *inconsistent* judgments. Rivera Castillo v. Municipality of San Juan, 130 D.P.R., 683, 691 (1992); Cuadrado Carrión v. Romero Barceló, 120 D.P.R. 434 (1988) on page 446 (1988). *See also*, 7A Wright, Miller & Kane, Federal Practice and Procedure § 1754, on page 55 (2005).

This action, as many of our procedural provisions, has its origin in the Anglo-Saxon customary practices, where it appears as an exception to the maxim that states that each person is entitled to their "day in court". The general common law rule supposes that when resolving a controversy, all parties interested are to be present in court. However, British Courts of *equity* -which main function was to do justice surpassing the formalisms of *common law*, and- acknowledges that this general rule was too strict; that is why they developed a recourse to resolve matters

common to a group. Wright, Miller & Kane, *supra* § 1751, at pages 1922. Eventually, this pr. ice was introduced in the United States, and in 19[illegible], it became Rule 23 of the Federal Rules of Civil Procedure. 1

Said rule, drafted by Professor James Moore, establishes three forms or dimensions of a class action. Homburger, *State Class Actions and the Federal Rule*, 71 Columbia L. Rev. 609, 608-619 (1971). In the first place, there was a true class action, in other words, that which was comprised by persons who resort to the Court alleging joint rights among the members of the class. *Id. See also*, Wright, Miller & Kane, *supra* § 1752, at pages [19-22]. In the second place, there was a class suit known as hybrid, comprised by persons who resort to the court regarding joint facts regarding a specific property or fund. Homburger, *supra*, at page 605. Lastly, the spurious class suit was introduced, constituted by persons who are holders of joint rights, joined by a common question of law or fact. *Id* at page 606.

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According to *Moore*, each one of these actions had differed substantive effects. In essence, he asserted that the judgments entered in true and hybrid class suits constituted *res judicata* for all members of the class, while in the spurious class suit, the effects are limited to the persons joined as parties before the Court. *Id.* This interpretation, although not included in the drafting of Rule 20, was adopted by judicial interpretation by the federal courts. *Id.*

Not all treatisists agreed. Some argued that the limited effects of the spurious class suit adopted in the Federal procedural system defeated the purpose itself

of the class action. Thus, for example, one of them stated the following:

> Where, as in the case of spurious class suits, the conclusive effect of the class judgment has been repudiated, its efficacy has shriveled nearly to the vanishing point. As a result, subdivision 23 (a) is not a class suit functionally. Thus, the spurious class ensued, with which on its face offered the greatest promise of enlarging the scope of federal representative actions, has been judicially been divested of its great potential utility. Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 Columbia L. Rev. 818, 825 (1946).

Further, these categories created confusion in the courts, which, with the intention of doing justice, converted typically spurious cases classes into any of the other classes or forgot to classify the class, thus creating the problems at the time of executing judgment. *See* Edward S Labowitz, *Class Actions in the Federal System and in California: Shattering the Impossible Dream*, 23 Buffalo Law Rev. 601, 635 (1973).

Thereafter, in Hansberry v. Lee 311 US 32 (1940), the Supreme Court of the United States accepted, in dicta, the possibility that the effect of the judgment may be extended to absentee members of a class · as occurs precisely in the spurious class suit -- if these were adequately represented by the members present. 2 Pursuant to this opinion, in 1966, Rule 23 of Federal Civil Procedure was revised to eliminate the artificial distinction between the different forms of class actions. In turn, it introduced the more practical concept in accordance to the inclusive nature of his procedural figure. Federal Rule of 1966, still current,

eliminated the above-mentioned categories and created a less technical procedural system more open to group claims. Wright, Miller & Kane, *supra* §1752.

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As is common knowledge, in Puerto Rico we have been progressively adopting the American Civil Procedure System. 3 Along that course, new Rules of the Code of Civil Procedure were enacted in 1943, these were basically a translation of the Federal Rules of Civil Procedure. Rafael Hernández Colón, Manual of Civil Procedure Law 4- 12 (1981). At that time, we introduced the figure of the class suit as drafted in Rule 23 of Federal Civil Procedure, in its 1938 version. Thus, to define a class pursuant to our procedural provisions of 1943, it was necessary to meet to general requirements, to wit, that the members of the class be so numerous that their appearance before the Court would be impossible and that there be adequate representation of all of the members of the class. In addition, the new rule established the three class classifications according to the juridical relationship of the members thereof, in other words, "true", "hybrid" and "spurious". 4

Likewise, when interpreting the rule, we followed the American trend of assigning different normative effects on each kind of class. Thus, in People v. Henneman, 69 D.P.R. 995, 986 [sic] (1949), in a footnote, we adopted the reasoning followed by federal jurisprudence as to these class suit categories. Later, in Caguas Lumber Yard, Inc. v. Superior Court, 96 D.P.R. 848 (1969) we reintegrated Professor Moore's theory, used in the federal courts, as to that the spurious class suit is only one mechanism of allowable joinder that serves those who are in a similar situa-

tion as the plaintiffs and could be able to join the suit, if they so desire. We also ruled that the judgment entered in such cases would not be conclusive for the members of the class that did not resort as parties to the court.

From the above stems the fact that class actions in Puerto Rico suffered the same fate as class actions in the United States before the Federal Rules of Procedure were amended in 1966. As pointed out above, in the United States, this interpretation had caused serious problems for filing group claims which did not represent joint or several rights, flaws that were corrected in the Federal Rules by the amendment of 1966.

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Within this context and in response to the need of making class actions a useful mechanism for consumers, our Legislature approved Act No. 118 of June 25, 1971, 32 L.P.R.A. 334, creating the goods and services consumer class suit. Evidently, when this law was passed, an exception to Rule 20.1 was established, providing that a technically "spurious" class could obtain a judgment which effects would be extended to all members of the class even if they were not present in court. Specifically, Act 118 acknowledged the rights of the goods and services consumers and of the Commonwealth of Puerto Rico, as *parens patriae*, to file a class suit on behalf of said consumers for damages."

This new legislation incorporated, in an abbreviated manner, several provisions of Federal Rule 23. In the first place, it requires that the court rule, as soon as possible, whether the lawsuit can continue as a class action, when there is a common question of fact and law among the allegedly affected consumers. This re-

quirement is similar to the one that has been named "commonality". 5 Likewise, Act 118 requires that the class suit be deemed superior to other available resources for the fair adjudication of the controversy. Lastly, Act 118 adopts the norms of Federal Rule 23 regarding notice to class members.

The objective of overcoming the flaws of Rule 20 by then, in force, is clearly set forth in the extremely inclusive language used by the legislator when defining the class as a group of people who have among them a "common question of fact or law". 32 LPRA §3344. This attempt also arises from the Joint Report of the Senate on S.B. 825 of April 15, 1971, which expressly points out that "the purpose of this measure is to make an addition to Rule 20 of the Civil Procedure in order to allow goods and services consumers to file a class suit" (emphasis ours)[sic].

The statement of motives of Act 118 highlights the legislator's concern regarding the limitation of the legal tools available to Puerto Rican consumers, pointing out that:

> Unfortunately, the remedies available for consumers to enforce their rights are still inadequate and the protection offered the consumer by the Consumers Service Administration ... 6 is not sufficient. .. For this reason, a suit filed directly by the consumer is warranted in such cases.

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In addition, Act 118 acknowledged the inherent difficulty of claiming small sums against big businesses. It is so recorded also in its statement of motives by stating that:

> **Usually, consumers claims involve such small amounts of money that they do not justify an individual suit; it is more economical and fair for essentially identical claims to be filed in a single class suit on behalf of all consumers who have been cheated and deceived ... This type of action compensates the inability of the individual consumer to litigate small individual losses by allowing that one or more representatives of a group of consumers with similar damages may bring a suit on behalf of a class ... The latter are forced to consider not only the direct economic loss of the class suit but also the publicity and public reaction with the ensuing loss of time, name or prestige. In the interest of discouraging the improper and deceitful conduct of the goods and services suppliers to consumers, the Legislature of Puerto Rico considers it of imperative necessity to establish the consumer class suit.**

This means that Act 118 intended, on the one hand, to extend the scope of Rule 20 overcoming the limitations imposed on the so called spurious class, and on the other, to authorize the consumers to go directly to Court to enforce their rights without having to be assisted by a government agency. In this sense, its objective is to eliminate all legal obstacles that might make it difficult for consumers to go to Court.

In short, the class suit established by the Goods and Services Consumer Class [Suit] Act had the purpose of overcoming the limitations of the old Rule 20 of Civil Procedure, allowing consumers, as well as the State, to go to Court and safeguard the rights of consumers. It constitutes, according to its statement of motives "an addition" to the general provisions of

Rule 20. Therefore, it did not necessarily create a different class suit but, in acknowledging the public interest to protect the goods and services consumers, it extended the scope of the class suit to them. This, in addition to the fact that Act 118 does not establish specific criteria to define what constitutes a class, means that at the time of certifying a class, the courts must examine whether they meet, not only the general definition of Act 118, but also the specific requirements of Rule 20.

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We must highlight that Rule 20, now in force, is the 1979 amended version, after the promulgation of Act 118. That year, Rule 20 was revised entirely to make it similar to the Federal Civil Procedure Rule 23 adopted in 1966 and allow, therefore, the filing of typically spurious class suits. Obviously, the intent was to stretch the definition as well as the scope of class actions so that they would be more accessible to other groups that, just as goods and services consumers, would not have any other means and, as a practical matter, opportunity to assert their rights in court. 7[.]

It is necessary to recognize that when amending Rule 20, Act 118 lost part of its initial relevance. Nonetheless, this does not mean that it is dead letter. When the new Rule 20 was passed, our Legislature did not abolish the Consumer Class suit Act. It survived as a specific tool that grants consumers a broad and effective means to protect their rights. Although it is a section similar to that of Rule 20, the consumer class suit allows to grant additional remedies, among these, the *injunction,* and acknowledging the consumers' right to file suit pursuant to the Monopoly

Act of the Commonwealth of Puerto Rico, 10 L.P.R.A. section 257 et seq.

As we stated above, Act 118 authorizes the goods and services consumers to resort to the court to enforce their rights, allowing them to avoid obstacles which, at times may be presented in bureaucracies in the agencies called upon to defend them. Act 118, thus, constitutes, a mandate for the courts to open the doors to consumers injured by the legal practices of goods and service providers.

This mandate was approved as recently as in 2002, when approving Act 269 of November 16 of that year, which amended Act 118 to clarify the primary jurisdiction of the First Instance Court in this kind of litigation. Therein, the legislator stated in its statement of motives that:

> The protection to the goods and services consumers is invested of the highest public interest. Through this law, the Legislator solidifies the cause of action provided by Act 118 when clarifying that the First Instance Court would have exclusive jurisdiction because it is dealing with a special cause of action.

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In summary, when evaluating the discretion of the First Instance Court at the moment of certifying a class, we cannot set aside the mandate of the Legislative Assembly of opening the way for consumers.

From all of the above, it is necessary to highlight the following points. In the first place, Act 118 did not create any form of class suit different than what was established by Rule 20, rather, it extended the remedies available to the goods and services consumers. In

turn, the applicable requirements to certify a class of goods and services consumers, we must emphasize the requirement of "predominance and superiority" and "commonality", which, although present in Rule 20, arc the only ones expressly provided in Act 118. This means that when class actions are presented pursuant to this Act, we must first attend those two requirements to determine whether an alleged class is a creditor to the remedies established therein. Once the requirements of "predominance and superiority" and "commonality" are met, it is necessary to examine whether the supplementary requirements of Rule 20 are met, in other words, "numerosity, typification and adequate representation.[sic] However, when applying these requirements we are called upon to interpret them with the spirit of liberality and inclusion inspired by At [sic] 118.

III [sic]

Having clarified the above, let us examine the particular facts of this case, interpreting the criteria of "predominance and superiority" provided by Act 118and the other criteria of Rule 20 of Civil Procedure, with the liberality required by Act 118. There is no doubt that it is within a broad framework of discretion of the First Instance Court to determine whether a lawsuit qualifies as a class action. This commonly means that the reviewing courts should not intervene in that decision; unless it is proved that the instance forum has abused its discretion. Meléndez Vega v. Caribbean Intl. News, 151 D.P.R. 649,664 (2000); Lluch v. España Service Sta., 117 D.P.R. 729, 745 (1986); Valencia. Ex parte, 116 D.P.R. 909, 913 (1986); Ortiz Rivera v. Agostini, 92 D.P.R. 187, 193 (1965), José Cuevas Segarra, Law Treaty for Civil Procedure, 396. Nevertheless, as we

pointed out earlier, in the particular case of the class suit of goods and services consumers, said discretion is limited by the public interest in favor of the consumers, as stated by Act 118. Not acting this way would attempt against a clear and reiterated legislative intention.

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Rule 20.1 of Civil Procedure sets forth four requirements in order to be able to file a class suit:

> (1) that the class be so numerous that the joinder of all of the members is deemed impracticable, in other words, *numerosity*;
> (2) that there are questions of fact or law common to the class, in other words, commonality;
> (3) that the claims of the representatives be typical of the claims of the class, in other words, typification;
> (4) that the representatives fairly and adequately protect the interest of the class.

In addition, in order for the certification of a suit to be proper as a class suit, it is equally necessary to meet, at least, one of the requirements of Rule 20.2 of Civil Procedure; among these alternative requirements, Act 118 itself demands to meet specifically with the requirement of "predominance and superiority" contained in Rule 20.2 (c) in a manner very similar to language used to define the disappeared spurious class suit, this paragraph (c) defines a sustainable class as that in which "questions of fact or law common to the members of the class predominate over any matters that only affect individual members".

Commonality, predominance, and superiority

The requirements of "commonality" and "predominance and superiority" are intimately related and we will examine them together. The requirement that there be a question of fact or law common to the class is similar to what is required for joinder and intervention in Rules 17 and 21 of Civil Procedure, 32 L.P.R.A. Ap. III, with the difference that Rule 20 does not demand the questions of fact or a law to arise from the same act, omission or event. In addition, this requirement is present in Act 118 in its section 4, where it is provided that "the Court... shall determine whether a common question of fact and law exists and that the class suit is superior to the methods available for the fair and efficient adjudication of the controversy", 32 L.P.R.A. section 3344.

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On the other hand, as we stated in Cuadrado Carrión v. Romero Barceló, 120 D.P.R. 434 (1988) on page 451, there is a conceptual statement regarding the requirements of "impracticability" and "commonality". Both referred to those who comprise a class, in other words, to the absentee members of the represented class, while the requirements of "typification" and "adequate representation", discuss hereinbelow, describe the characteristics that the representatives must necessarily possess.

To meet the "commonality" requirement, it is not necessary that the questions set forth be completely identical. Forbush v. JC Penney Co., 994 F.2d 1101 (1993) Port Authority Police Benev. Assn. v. Port Authority, 698 F.2d 150 (1983); Abramenlovitz v. Ahern, 96 F.D.R. 208 (1982). The concept is qualitative and not quantitive [sic]; it only requires that what is claimed requires to rule on a question of fact or law

common to those represented, and as established by Rule 20.2 (C), as well as Act 118, it is common to the members of the class "predominate over any questions that affect... the members individually" and the class suit be the superior means to adjudicate the controversy. *See* Wright, Miller & Kane *supra* §§ 1763 and 1766. This maxim does not apply to suppositions or instances provided by Rule 20.2 (a) and (b), Cuadrado Carrión v. Romero Barceló, 120 D.P.R. 434 (1988) at page 451.

The petitioners allege that there are among the members of the class whom they intend to represent common questions of facts, to wit, the alleged sales of adulterated milk by co-defendants **Tres Monjitas** and Suiza to fresh milk consumers of Puerto Rico. They adduce, and the First Instance Court itself admits, that in order to certify the class. It is not necessary to show that adulterated milk was, in fact sold, nor the damages that, if consumed, it would have caused. These rulings correspond to a subsequent evidentiary phase before the First Instance Court. At the stage in which the proceedings are, it is only necessary to show that the alleged conduct of the defendants is common to the members of the class, as defined by its representatives. Evidently, the arguments of the respondents as to that in Puerto Rico, "adulterated milk was never sold" or as to that they are the ones injured by the fraud of adulterated milk, are excessive at this stage of the litigation.

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On the other hand, we have no doubt that in this case, the cause of action is superior to other means to resolve the controversy. To attend to the requirement of superiority, it is necessary to have present the

guidelines proposed by Rule 20.2 (c), in other words, "the interest of the members of the class in individually controlling the prosecution or defense of separate suits; the nature and scope of any litigation pertaining to the controversy already commenced by, or against, the members of a class; the desirability or not of concentrating the process of the claims in the specific forum; the difficulties that would probably arise in the prosecution of a class suit." Let us see.

In terms of the individual interest of the members of the proposed class, we must state that the lack of interest of presenting individual claims to recover the excess paid in damages as a consequence of buying adulterated milk is evident. This lack of interest may be logically inferred from the nature of the claim and how complicated a litigation would be where technical matters regarding milk quality must be proven. In addition, the individual loss of the members of the class is relatively small and unattractive to obtain individual legal representation. Likewise, even supposing that the amount to be claimed individually were substantial, it would be so extremely impractical and onerous to render justice that each consumer have to resort individually before the courts to demand compensation as a consequence of the consumption of adulterated milk. It does not appear from the file either that there is any other lawsuit similar to this one that would provoke an impediment as to the second and third criteria of paragraph (c) of Rule 20.2. Lastly, as to the manageability of the lawsuit, we must state that the high number of litigants cannot constitute in itself an obstacle not to certify a class. Said argument is contrary to the spirit of Act 118 itself and goes against the internal logic of Rule 20, which requires the class to be numerous.

From the above, we will briefly examine the other general requirements of Rule 20 applicable to this case.

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B. Numerosity

Rule 20 does not offer parameters as to what constitutes a numerous class. This explains why the jurisprudence 11uctuates in its interpretation. However, there is consensus that the number of persons that comprise a class is not decisive in the determination of "impracticability"; this is a matter to rule case by case, according to the circumstances. Cuadrado Carrión v. Romero Barceló 120 D.P.R. 434 (1988) at page 449, *citing* DeMarcano v. Edens, 390 F. 2d 836 (1968); Swanson v. American Consumer Industries lnc., 415 F. 2d 1326 (1969); Cash v. Swifton Land Corp., 434 F. 2d 569 (1970); Ballard v. Blue Shield of Southern W. Va., Inc., 543 F. 2d 1075 (1976); Weiss v. York Hosp. 75 745 F. 2d 786 (3rd Cir. 1984). *See also* Wright, Miller & Kane, *supra* § 1762. Impracticability does not mean either that he/she who requests certification must show that joinder is impossible, Cuadrado [Carrión] v. Romero Barceló, 120 D.P.R. 434 (1988), at page 450; Samuel v. University of Pittsburgh, 56 F.D.R. 435 (1972); it is enough that he/she show that such action would create serious inconveniences and obstacles in the prosecution of the suit. Cuadrado Carrión v. Romero Barceló 120 D.P.R. 434 (1988), at page 450 citing Union Pacific Railroad v. Woodahl, 308 F. Supp, 1002 (1970). See Robidoux v. Celan, 9117 F.2d 931, 935 (1993).

We have further acknowledged other elements together with this numeric factor aid in the analysis. To such effects, we state, for example, geographical

dispersion, the possibility that the members of the class may be identified for purposes of documentation, the nature of the suit, the amount of the claim, and the ability of each member to enforce his/her rights individually; Cuadrado Carrión v. Romero Barceló, 120 D.P.R. 434 (1988) at page 450.

The initial ruling of whether a suit may succeed as a class suit cannot rely on mere speculation, the weight of evidence should fall on the promoter of the certification. This does not mean, however, that such party must allege or prove the exact number of the members of the class. It is sufficient to present any evidence or reasonable estimate of the potential number of individuals represented. *In citing* Garcia v. Rush Presbyterian - St. Luke's Medical Ctr., 80 F.D.R. 254, 268 (1978) *see* Vergara v. Hampton 581 F.2d 1281 (1993).

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In this case, the First Instance Court concluded that "the potential class represented by Guzman and Juarbe is numerous. Based on an analysis of milk consumption in the country, we have no doubt that there is a possibility that a large group of citizens could be part of a class..." However, the Court also stated that "after four years of having filing the action at bar have elapsed, we do not have knowledge of Puerto Rican citizens that may have formally requested to join as a represented party of the class." Having stated this, it concluded that it was not proper to convert the litigation in a class suit because the requirement of "numerosity" had not been met.

There is no controversy whatsoever with the fact that no other consumer, aside from the plaintiffs, have requested to intervene in the lawsuit at bar. However,

neither Rule 20, nor much less Act 118, requires joinder. Moreover, if it were required for other consumers to enter into the lawsuit to achieve to certify the class, it would place us in a similar situation, although not identical, to what happened when the prior version of Rule 20 was current. The express objective of Act 118, as we explained, is to urge such claims that because they deal with insignificant amounts at an individual level do not really motivate the appearance of consuming individual consumers to court, but at a collective or group level becomes very important. To allow a court to demand at its discretion the intervention of other plaintiffs as a condition to certify a class defeats the purpose itself of this law.

Equally contrary to Act 118 is the conclusion of the Court of Appeals, in the sense that it would be "impossible to identify the members of the alleged class... for purposes of joinder" it was "forceful... to infer that the requirement of numerosity is not present in this case". Again, this interpretation of the consumer class suit returns us to the state of law prior to the legal reforms that we have discussed and is contrary to the public policy set forth in Act 118. Nothing in Act 118, or the current Rule 20 suggests that the potential members of a class must be identified" or specifically numbered. As we previously stated, it is not even necessary to provide an exact number of the members of the class, being sufficient to submit a reasonable estimate. In this sense, the petitioners argue correctly that the criteria adopted by the judgment appealed would exclude from the definition of class most of the possible consumer litigations. Act 118 responds, precisely to the difficulty in being able to identify consumers that would have paid provision goods at overprice, such as coffee, bread, bottled wa-

ter, and others. To establish such a strict standard of "numerocity" [sic] that would deprive of remedy the person who this law intended to protect and would place the large goods and services providers in a very advantageous position, contrary to the express objective of Act 118.

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Through the testimony of the defendants themselves during the hearing for certification of the class, a reasonable estimate of the potential number of members of the class was presented. The defendants stated how much fresh milk cartons were sold per year and the estimate of per capita consumption, which would allow to clearly deduct how numerous the class of consumers represented in the suit is.

Hence, with the testimony of Mr. Luis Fullana Morales, Leovigildo Méndez and Jose Meléndez Rodriguez, several very important facts were established. In the first place, it was established that the defendant companies sold and elaborated all of the milk that is consumed in Puerto Rico. It was also shown that during the years 1993 and 1994, codefendant Suiza and Tres Monjitas sold 311,820,081 quarts of fresh milk. It is estimated that Puerto Ricans consume around 90 quarts per capita. Based on the same data, the plaintiff estimated 3,464,668 milk consumers in Puerto Rico.

C. Typification

The claims or defenses of the representatives must be typical of the claims or defenses of the class. This criteria, similar to that of "commonality", deals that one of the characteristics the plaintiffs must possess. The "typification" requirement deals specifically with the relationship between the claims of the plaintiffs and

those of the class that is intended to represent them. Certainly, this requirement is also related to the fact that those who represent the class must adequately defend the interests of its members.

When the claim of the plaintiffs is typical, the plaintiffs and other members of the class have an interest in prevailing in the shared claim; thus, when the representative defends their interests, they advance the interests of the whole class. On occasion, as occurred in Cuadrado Carrión, 120 D.P.R. 434 (1988) the cause of action caused the interests of some of the members of the class to be inherently opposed. In this case, we ruled that a supposed class that alleged political discrimination, but that was comprised of members of both political parties, did not meet the requirement of typification due to the crossed interests of the members of a class.

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By its own nature, the determination of typification operates case by case. Jurisprudence and Doctrine accept that the class does not necessarily have to be comprised by persons with identical claims in order to produce a circumstance of impeccable uniformity. Cuadrado Carrión 120 D.P.R. 434 (1988) at page 454. In this case, there is no doubt that the plaintiffs meet this requirement. Neither the allegations of the parties, nor from the files does it appear that there is a possibility of a conflict among the members of the proposed class. The members of the class do not represent any allegation that would result contrary or opposed to the typical claim of adulterated milk consumers. We cannot logically infer, nor have the parties proposed, any conflict between the claims that

the plaintiffs make and others that other defrauded milk consumers could make.

B [sic] Adequate representation

This last requirement enjoys a special relevance because it has its constitutional genesis in due process of law. After all, "[o]nly adequate representation of the interests of the absent members avoids the class suit to be unconstitutional by ensuring that due process of law is met." Cuadrado Carrión. This requirement ensures the demand that every person have their "day in court" and that no one can be affected by an *in personam* judgment in a proceeding in which it has not been a party. *Id. Citing* Pennoyer v. Neff 95 US 714 (1877).

Currently, the main factors and differential notes of the analysis of "adequate representation" are concentrated in (1) *the absence of conflict*, and (2) the guarantees of *aggressive and vigorous litigation*. When the claims or defenses of those represented are not typical of the claims or defenses of the class, there is an inherent problem of conflict, because the requirement of minimum adverse interests characterizing our adjudicative law is not met. When the mentioned danger does not exist, the analysis of vigorous prosecution emphasizes on the characteristics of the attorney of the representatives of the class. Cuadrado Carrión 120 D.P.R. 434 (1988) at page 455.

As we have already stated, we have not found conflict in the allegations of the plaintiffs. Regarding the capacity of their legal representation and the interest it shows in continuing with the lawsuit, it is necessary to state the following. The respondents themselves state that "they do not question the academic background and experience of said attorneys". 9 However,

they have raised objections in terms of the legal strategy followed by the plaintiffs and allege that the attorneys only pursue to increase their fees through a class action. They specifically state that the plaintiffs have "decreased" the original claim of $20,000 to no less than $300 for each defendant, they noted that under any "any scheme of possible compensation in this case, the only persons that will benefit...are the legal representatives of the petitioner...".

Regarding the above, we must state, in the first place, that the differences in terms of legal strategies cannot presuppose a sustainable argument against classification. The legal counsel of the plaintiffs in this case has shown, at least, aggressiveness and interest in the lawsuit, which is shown by the presentation of this suit before the Supreme Court itself. Regarding the changing amount, we observe that in the original claim, a fixed amount was requested; while in the second, a minimum amount was alluded. This, in itself, does not evidence inadequate representation of the plaintiffs.

Regarding what is alleged by the respondents questioning the fact that the attorneys will benefit from the outcome of the lawsuit, several brief comments must be stated. Act 118 had the purpose of facilitating lawsuits of this kind, establishing, among others, a minimum amount of 25% of the damages adjudicated as attorneys' fees. This, evidently, with the objective of promoting attorneys to be willing to commit their time and effort of this kind of claim. Otherwise, few legal professionals would be willing to invest their capacity and time in exiguous claims of individual consumers. 10[.]

IV

We conclude that the class suit proposed by the petitioners met all of the requirements provided by Rule 20 of Civil Procedure, and therefore with the requirements of Act 118 as to identity of the class. In other words, how the petitioner shows that in the picture of the class proposed, the common questions predominate over the individual ones and the class suit constitutes a mean superior to others to attend the these claims. In addition, it clearly appears from the file that the proposed class meets the criteria of "numerosity" as defined by Rule 20. Lastly, the comments related to the need of duly defending the interests of the proposed class (numerocity [sic] and adequate representation) were proven via the pleadings of the parties, the nature of the claim presented and the Leo Evers of the petition is up to the present. We then rule that the First Instance Court abused its discretion by not certifying the class proposed by the petitioners. Therefore, the Court of Appeals erred in confirming the instance ruling.

In light of the above, the sentence appealed is remanded and the case is returned to the First Instance Court to continue proceedings pursuant to this ruling.

Judgment will be entered accordingly.

Liana Fiol Matta
Associate Judge

End Notes

[1] [Omitted from original submitted]

[2] [Omitted from original submitted]

[3] Before the American invasion in 1898, in Puerto Rico applied the Code of Civil Procedure of 1886 which remained in force until August 16, 1899, when the Military Government issued the Order # 118 which reorganized the judiciary branch and"[sic] provided norms regarding judicial, civil and criminal procedures. This Order established certain procedural rules and recognized the force and effect of many others of the prior Code of Civil Procedure that remained partially in effect. On March 10, 1904 the Code of Civil Procedure of 1904 was approved, it was prepared by the so-called "Commission of Codes", in charge of harmonizing our legal system with the new political regime. Rafael Hernandez Colon, Manual of Civil Procedure Law 4-12 (1981).

[4] [Omitted from original submitted]

[5] This is the same requirement of Rule 20.1 (2) of the Puerto Rico Civil Procedure.

[6] Predecessor of the Department of Consumer Affairs.

[7] Footnote omitted (about real, hybrid and spurious classes)

[8] [Omitted from original submitted]

[9] [Omitted from original submitted]

[10] [Omitted from original submitted]

No.: 2007-270 CERTIFICATE OF TRANSLATOR

I, Mayra Cardona Durán, of legal age, single, resident of Guaynabo, Puerto Rico, Certified Interpreter of the United States District Court and certified member of the National Association of Judiciary Interpreters and Translators, and admitted to the Puerto Rico Bar Association, hereby CERTIFY: that according to the

best of my knowledge and abilities, the foregoing is a true and faithful rendering into English of the original Spanish text which I have translated and it is stamped and sealed as described herein. This document is comprised of Fourteen (14) pages, including this certification page, and does not contain changes of erasures.

In Guaynabo, Puerto Rico, today, Tuesday, February 06, 2007.

/s/

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